

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: § CASE NO. 23-90020-11
§ JOINTLY ADMINISTERED
§ HOUSTON, TEXAS
SERTA SIMMONS BEDDING, LLC, § THURSDAY,
ET AL, § MAY 18, 2023
DEBTORS. § 9:00 A.M. TO 12:19 P.M.

SERTA SIMMONS BEDDING, LLC, § CASE NO. 23-9001-ADV
ET AL, § JOINTLY ADMINISTERED
§ HOUSTON, TEXAS
VERSUS § THURSDAY,
§ MAY 18, 2023
AG CENTRE STREET PARTNERSHIP, §
ET AL § 9:00 A.M. TO 12:19 P.M.

CONFIRMATION DAY FOUR - MORNING SESSION (VIA ZOOM)

BEFORE THE HONORABLE DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

(Recorded via CourtSpeak. Witnesses could barely be heard.)

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(Please also see Electronic Appearances.)

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1 HOUSTON, TEXAS; THURSDAY, MAY 18, 2023; 9:00 A.M.

2 THE COURT: Good morning, everyone. This is Judge
3 Jones. The time is 9:00 o'clock Central. Today is May 18th,
4 2023.

5 This is the Docket for Houston, Texas. On the
6 9:00 o'clock Docket, we have continued proceedings in the
7 jointly administered cases under Case No. 23-90020, Serta
8 Simmons Bedding LLC, as well as the adversary, 23-9001.

9 As always, please don't forget to record your
10 electronic appearance. A quick trip to the website, a couple
11 of mouse clicks. You can do that at any time prior to the
12 conclusion of today's hearing.

13 First time that you speak, if you would please state
14 your name and who you represent. That will greatly assist the
15 court reporter do their very difficult job.

16 As always, we are recording these in Courtspeak.
17 We'll get the audio again we've been splitting up into two
18 pieces. I hope some of you have taken advantage of that. But
19 we'll continue that process.

20 And with respect to the folks who are observing
21 online, I have activated the hand-raising feature. If for any
22 reason you need to speak, you need to hit five star on your
23 telephone. I'll see that. I'll get you unmuted and then you
24 can be heard.

25 All right, I think that's everything.

1 MS. BARRINGTON: Good morning, Your Honor. Luna
2 Barrington for the Debtors.

3 Just a minor housekeeping matter before we begin,
4 Your Honor. The Debtors would like to move into evidence the
5 30(b)(6) deposition transcripts of Defendants Angelo Gordon,
6 Gamut and North Star.

7 And we've got copies here for the court today.

8 THE COURT: Thanks. Are they marked as exhibits or
9 are we just agreeing to tender them as the testimony?

10 MR. EHRLICH: We're happy to tender them or mark
11 them as the Court prefers.

12 THE COURT: Yeah, just for purposes because the
13 Record is going to be slightly messy in all of this.

14 Why don't we actually mark them and if you have
15 somebody do that then just come back and tell me what the
16 numbers are. Don't forget. I'll make a note as well.

17 That way they're there and then I'll take them.
18 Obviously, I'm not going to read them until tomorrow or
19 Saturday anyway.

20 MS. BARRINGTON: Sure, absolutely, Your Honor.

21 THE COURT: All right.

22 MS. BARRINGTON: Thank you.

23 THE COURT: Mr. Ehrlich?

24 MR. EHRLICH: Good morning, Your Honor. For the
25 Record, Andrew Ehrlich from Paul Weiss on behalf of the Ad Hoc

1 Group of Excluded Lenders.

2 We would call as our first witness, Theo Kwon.

3 THE COURT: All right, Mr. Kwon, if you'd please
4 come forward, sir?

5 (Pause in the proceeding.)

6 THE COURT: Mr. Kwon, right up here, please, sir.

7 (Pause in the proceeding.)

8 THE COURT: Good morning, before you sit down, if
9 you would raise your right hand, please, sir?

10 (Witness sworn.)

11 THE COURT: Thank you, sir.

12 MR. EHRLICH: Your Honor, may I approach?

13 THE COURT: Absolutely. Thank you.

14 (Pause in the proceeding.)

15 THE COURT: And Mr. Ehrlich, are we just publishing
16 in the courtroom this morning?

17 MR. EHRLICH: Refer to Mr. Carlock on that.

18 MR. CARLOT: Yes. Please, Your Honor.

19 THE COURT: All right. It should be ready to go.

20 MR. EHRLICH: May I proceed, Your Honor?

21 THE COURT: Please.

22 DIRECT EXAMINATION

23 BY MR. EHRLICH:

24 Q Good morning, Mr. Kwon. Can you please introduce
25 yourself to the Court?

1 A Yeah, good morning, Your Honor. I am Theo Kwon.

2 Q And Mr. Kwon, what do you do for a living?

3 A I'm an investment professional at Apollo.

4 Q And before entering the courtroom today, did you read or
5 listen to any of the proceedings at this trial and
6 confirmation hearing?

7 A (No audible response.)

8 Q And what's your position at Apollo?

9 A I'm a partner at Apollo.

10 Q And when did you join the firm?

11 A I joined the firm in 2015.

12 Q And when did you become a partner?

13 A A partner in 2019.

14 Q And what did you do before you joined Apollo?

15 A I joined the private equity field for most of my career.
16 And prior to that, few years in investing.

17 Q And do you hold any academic degrees?

18 A I do. I have a bachelor in science of economics from the
19 Warden School at the University of Pennsylvania. And also
20 have master of business administration from the same school.

21 Q Now can you describe for the Court, Mr. Kwon, just at a
22 high level, what it is that Apollo does?

23 A Yeah Apollo is a global alternative asset manager. What
24 does that mean? We invest on behalf of our clients across the
25 risk spectrum from credit, yield, hybrid equity to equity.

1 And we manage close to \$600 billion in assets.

2 Q And are you in any particular group within Apollo?

3 A I'm in a few groups, but mostly in the private equity
4 group.

5 Q And as a partner who works with the private equity group,
6 what are your responsibilities?

7 A My primary responsibilities are to source good attractive
8 risk return investment opportunities for investors. To
9 underwrite them.

10 Q Now has Apollo purchased Serta first lien loans,
11 Mr. Kwon?

12 A Yes, we have.

13 Q And when was the first time that Apollo purchased Serta
14 first lien loans?

15 A My recollection, starting in 2016.

16 Q And was that part of the initial syndication of the
17 credit agreement?

18 A (No audible response.)

19 Q And did Apollo purchase additional loans in 2017?

20 A My understanding, yes.

21 Q And how about 2018?

22 A I believe so.

23 Q And do you know when Apollo sold out of the loans that
24 were purchased in 2016, '17, and '18?

25 A My understanding sometime in 2018.

1 Q And did you have any personal involvement in those
2 purchases and sales in the 2016 to 2018 period?

3 A I did not.

4 Q Now, did there come a time that Apollo began to purchase
5 Serta first lien loans, again after it sold it's position in
6 2018?

7 A Yes, we did.

8 Q And do you remember roughly when those purchases began?

9 A They began in March of 2020.

10 Q And did you have personal involvement in those purchases?

11 A I did.

12 Q And, when did Apollo first start considering making the
13 purchases that ultimately occurred in March of 2020?

14 A For the 2020 purchases, we started our work a few years
15 before. I think starting late 2018, early 2019.

16 Q And when you consider making investment of the kind you
17 ultimately made, do you have an underwriting process?

18 A We do. It's fairly extensive.

19 Q Can you describe for the Court the process you undertook
20 before making the purchases in March 2020?

21 A Yes. Like I mentioned, it's a fairly rigorous
22 underwriting process throughout Apollo. I think we take pride
23 in that for investors.

24 Typically for all investments, we will look at the
25 industries and target. We will look at the company, the

1 business model, management team, competitive positioning,
2 long-term trend, short-term trends.

3 We like to take a 360 view of the company and the
4 industry. In addition, if we're looking at credit
5 investments, we will diligence the credit agreements and
6 ancillary related agreements as well.

7 Q And, Mr. Kwon, when you do all of that work, do you
8 typically memorialize it in a memo?

9 A Yes.

10 Q And did you do that in the case of Serta?

11 A Yes, we did.

12 MR. EHRLICH: And if I could ask Mr. Carlock, please
13 to bring up what's been marked at Debtor's Exhibit No. 15 in
14 the main case, bearing the ECF 861-9.

15 BY MR. EHRLICH:

16 Q Mr. Kwon, it the first document behind Tab 1 in your
17 binder or you can look at it on the screen.

18 This is an email from someone named David Cheeon
19 (phonetic) to you, dated March 2nd, 2020. Who is Mr. Cheeon?

20 A Mr. Cheeon is a principal on my team.

21 Q Okay and do you recognize this?

22 A I do.

23 MR. EHRLICH: Your Honor, I would move Debtor's 15
24 into evidence.

25 THE COURT: Any objection?

1 MR. RUSINZYK: No objection.

2 THE COURT: It's admitted.

3 (Exhibit 15 received in evidence.)

4 BY MR. EHRLICH:

5 Q Now, Mr. Kwon, if you turn to the next page of the
6 document, you'll see the first page of a memorandum to
7 interested parties from David Cheeon and Theo Kwon.

8 Can you explain to the Court what this memorandum is?

9 A Yeah, so this is the investment memo summarizing our
10 diligence on Serta Simmons, the mattress industry and our
11 recommendation to buy first lien term loans. Looks like this
12 was issued in 2019 -- late 2019.

13 Q And --

14 A I have a practical question. Is this mine?

15 Q Yes, you can -- absolutely look at the hard copy there.

16 A What exhibit is it?

17 Q It's Tab 1.

18 A Thank you.

19 Q Were you involved in the preparation of this document?

20 A Yes.

21 Q Now, can you explain to the Court, at a very high-level,
22 what was Apollo's investment thesis around Serta Simmons in
23 November of 2019?

24 A Yeah. Like I mentioned, we spent over a year diligencing
25 the industry, the company. Our -- if we take a step back, our

1 investment thesis was that we liked -- we thought the
2 long-term trend in the mattress industry were attractive. You
3 had a stable industry with consolidated players. Serta
4 Simmons, in particular, had up to that point, you know,
5 10 years running of number one market share.

6 We generally like large companies of scale. We like
7 dominate players in the industry. Specific with Serta
8 Simmons, you know, they also had strong customer recognition
9 with their brand in Serta, in Simmons, in Beauty Rest and the
10 recently acquired Tuft and Needle at that time.

11 That was the long-term opportunity. The short-term
12 opportunity was the company had been going through a period of
13 disruption within their marketplace and within their
14 operations.

15 And the short-term opportunity we thought best realized
16 itself in the first lien debt that we recommended.

17 Q So if I could direct your attention, please, Mr. Kwon, to
18 the paragraph at the bottom of this page that begins "For over
19 10 consecutive years."

20 And in the middle of that paragraph, it states, "As
21 presented throughout the memo, we have spent significant time
22 and effort diligencing these industry head winds and
23 production declines and do not believe these challenges impair
24 the franchise nature of Serta."

25 Can you explain how that relates to your investment

1 thesis, sir?

2 A Yes, I mean that sums it up more eloquently than how I
3 described it.

4 Basically again, we felt very comfortable with the long-
5 term attractiveness of the industry and actually of the
6 company itself.

7 However, there were short-term issues that we need to
8 diligence. After that diligence, which we summarized in this
9 memo, we felt comfortable that the long-term prospects for the
10 company were not impaired and that it was a good longstanding
11 company for that type.

12 Q Now at this point in November of 2019, did Apollo buy
13 Serta debt?

14 A In 2019, no. We had recommended to buy it, but we did
15 not.

16 Q And why didn't you?

17 A It was approved by the investment committee. Our target
18 price was, I believe according to the memo, 52. The market
19 price just never got -- I'm sorry -- never got to that point.
20 So we never were able to buy.

21 Q Now at this point in time when you're recommending the
22 purchase of Serta loans, did you believe that a restructuring
23 of Serta was necessarily going to occur?

24 A We did.

25 Q You did?

1 A Yeah, that was basis.

2 Q And if it had not occurred, would that be a negative for
3 Apollo?

4 A Can you clarify?

5 Q Yeah, what if a restructuring hadn't occurred? How would
6 Apollo view that?

7 A I'm assuming if you mean -- so our base case was that the
8 company, while strong in it's long-term prospects, had short-
9 term disruptions. Mirror that with a capital structure where
10 they raised in 2016, they raised a significant amount of debt
11 to pay a dividend to the company and to the owners.

12 However, the profitability compared to 2016 versus when
13 we were underwriting the case, was significantly lower.
14 Meaning under our projection model the profitability of Serta
15 Simmons would never get to a -- would not likely get to a
16 point where it can be in a position to significantly refinance
17 the capital structure.

18 I.E., that's when the company expect would have to go
19 through restructuring.

20 Q Now I'd like to turn to the final sentence of this
21 paragraph where it says, "By reflecting the industry pressures
22 into our underwriting, we believe a distress for control
23 investment into Serta's first lien term loan presents a
24 compelling opportunity to invest at the top of the capital
25 structure within an attractive risk return profile for a

1 franchise business we would want to own at the right price."

2 So a couple of questions for you about this, Mr. Kwon.

3 First, what do you mean in this memo by distress for control?

4 A So this kind of goes back to the prior question. Our
5 base case understanding, the most likely scenario was that
6 Serta Simmons, while again good from a long-term perspective,
7 would not to get to a point -- that it would be able to
8 refinance its capital structure.

9 And so it would have to restructure its debt through a
10 bankruptcy process. And our view was that the first lien
11 loans would be basically the converted to equity at that point
12 in time.

13 Q Now, how much Serta first lien loan did Apollo ultimately
14 acquire?

15 A Ultimately?

16 Q Yeah.

17 A Around 190 million in par value.

18 Q And do you know prior to the 2020 transaction, how large
19 the tranche was?

20 A 1.9 billion.

21 Q So was Apollo ever attempting to acquire enough liens to
22 actually or loans, rather, to actually control the company?

23 A No. I mean, 1.9 is a big amount. Especially -- well at
24 least at Apollo, we like to authorize certain amounts. And as
25 we get to the market and buy more. If we continue to like the

1 opportunity, we'll continue to scale. But initial approval
2 was to buy a smaller amount and then reassess the situation
3 after that.

4 Q Now, Mr. Kwon, do you -- when you do this type of
5 analysis, do you model downside scenarios?

6 A We do, yes.

7 Q And did you do that in the case of Serta?

8 A Yes, we did.

9 Q And did that include the company entering into a
10 potential liability management transactions?

11 A Yes, it did. That was included in both our base cases
12 and our company.

13 Q Can you explain what it means that it was included in the
14 base case?

15 A Yeah, I'm sorry. At least at Apollo, when we underwrite
16 and evaluate investment, we model or project various
17 scenarios. Typically they're broken down into three
18 scenarios.

19 If the based case, which is the most likely outcome from
20 our prospective and diligence that will occur, there's upside
21 case if things break the right way. And you know, the company
22 is able to execute an opportunity that we know are available,
23 just, you know, that we don't conservatively incorporate into
24 our base case that's what's called an upside case.

25 And a down side case is the inverse of that. It is

1 things break against the company and in a negative fashion.

2 Here we incorporated on top of just business operating
3 projection, we put this to the credit investment, additional
4 liability management action that the company could take
5 against the first lien lender.

6 Q Okay and if I could direct your attention, Mr. Kwon, to
7 the page -- page 7 of the memo. It's page 8 of 112 at the
8 bottom of the page.

9 And I'd like to address the paragraph at the bottom of
10 the page. It says at the beginning of this paragraph that
11 Serta's credit documents from the 2016 recap are,
12 quote/unquote, "Sponsor friendly with sizable debt incurrence
13 and investment baskets. As such, we've been very focused on
14 the ability of Serta to add additional senior secured debt
15 that neither layer or dilute the first lien term loan or
16 transfer value away from the credit group."

17 Can you explain the analysis that you were doing there?

18 A Yeah, it's a good question. So like I mentioned we pride
19 ourselves on diligent underwriting.

20 This is getting to the second part of that where we were
21 underwriting our views on the credit agreement. And as we're
22 going through the credit agreement, there are specific
23 provisions that us and other debt investors will focus on.

24 They are debt incurrence baskets, investment baskets,
25 payment baskets. Just the ability --

1 FEMALE SPEAKER: What was the last --

2 BY MR. EHRLICH:

3 Q If you could just speak a little bit more slowly for the
4 court reporter, Mr. Kwon? Thank you.

5 A I think the last one was restricted payment baskets.
6 That is the ability for the company to take dividends away
7 from the credit group to the company itself.

8 So we will scrutinize those provisions very closely.
9 Those are usually highly negotiated during the issuance and
10 creation of the credit agreement. And with these specific
11 provisions they're quantified.

12 So the amount of value you can take away to a different
13 entity outside the credit group or dividend up to the
14 ownership group or incur above you is usually quantified and
15 so we did a very thorough underwriting of that.

16 And in our assessment was that it was a very sponsor
17 friendly credit document, that's why we described it as such.

18 Q And when you say sponsor friendly, what do you mean?

19 A Business friendly, company friendly.

20 Q Now if we look at the last sentence of this paragraph,
21 you say, "We believe incorporating these aggressive capital
22 structure moves the transfer value and bolster liquidity at
23 the expense of the first lien position, reflect an appropriate
24 amount of conservatism in the base case given the flexible
25 debt documentation."

1 Do you see that?

2 A Yes.

3 Q So what does it mean that this was incorporated into your
4 base case?

5 A Yeah, I think this refers to how we kind of created our
6 most likely scenario. This -- our underwriting mirrored our
7 perspective on the credit agreement. And so, because there
8 was pretty sizable baskets, as I talked about, those
9 provisions it was prudent to incorporate various liability
10 management transactions. Because we felt as though the
11 company was heading to restructuring. That the company would
12 pull on various levers to give them more time or evaluate the
13 credit agreement.

14 Q And if I could ask you, please, to turn to the next page,
15 it's page 9 of 112. There is a box at the top of the page
16 with what looks like a flow chart.

17 Can you explain to the Court what is represented here?

18 A Yes. So this is the summary of what we are discussing.
19 This incorporates various liability management transactions
20 that we had seen in the market occur very frequently.

21 And so with our market experience, mirrored again with
22 the underwriting of the credit agreement, we quantified and
23 incorporated various scenarios here into our underwriting.

24 So the very top is basically status quo. If we buy the
25 first lien term loan and everything breaks our way, nothing

1 from a liability management perspective happens, then we would
2 have a very strong return for our investors.

3 We didn't think that was reasonable and prudent to
4 incorporate into our projections just given the state of the
5 company and given, again, the large provisions in the credit
6 agreement that we just discussed.

7 So we -- in -- for the sake of the discussion with our
8 credit committee -- sorry, investment committee, we layered in
9 various scenarios sequentially to show people that we have
10 been thoughtful about our underwriting and how we have
11 incorporated various what we thought was the most likely
12 avenue for liability management into our investment of the
13 first lien.

14 So, again this is kind of a spectrum of what can happen
15 here. And then the second to last row is basically our base
16 case which incorporated sale lease back which incorporated a
17 dividend of the entire business, which was incorporated in
18 exchange of second lien loans.

19 So summing that all up. How does that translate to our
20 returns and this is what you are seeing on the right-hand side
21 of the page.

22 Q And Mr. Kwon, when you were doing this analysis in the
23 fall of 2019, did you account for in potential liability
24 management transactions, a transaction of a kind that was done
25 ultimately in June of 2020?

1 A We did not.

2 Q Now, I'd like to --

3 MR. EHRLICH: You can take this down Mr. Carlock,
4 thank you.

5 BY MR. EHRLICH:

6 Q I'd like to move ahead to March of 2020. What was your
7 understanding of Serta's financial condition in March of 2020?

8 A It was difficult like a lot of business during that time
9 due to COVID pandemic.

10 Q And did you go back to the investment committee to seek
11 authority to once again purchase Serta loans?

12 A Yes. During this time, we refreshed a lot of our work on
13 a lot of different industries and companies at that point in
14 time. The purpose was to incorporate the latest pandemic and
15 our views of the pandemic against the original underwriting.

16 For Serta Simmons, we did that and our view was that the
17 long-term value and a franchise nature of the company was
18 intact. However, they were going through another short-term
19 disruption. This one played out in terms of the COVID
20 pandemic.

21 How did that impact the company? This company
22 manufactures mattress and they sell mattresses predominantly
23 in North America through brick and mortar retail channels.
24 Those retain channels were literally shut when the COVID
25 pandemic started.

1 So we incorporated various assumptions on how the
2 pandemic would play out. And according to the assumptions, we
3 thought that the first lien term loans given that they were at
4 the top of the capital structure, would have been an
5 attractive investment albeit at a different price.

6 Q Mr. Kwon, I'd like you please to turn to Tab 3 in your
7 binder.

8 MR. EHRLICH: And Mr. Carlock, if you could bring up
9 Document 254-66, Defendant's 365?

10 (Pause in the proceeding.)

11 BY MR. EHRLICH:

12 Q And Mr. Kwon, this is an email from someone named Gray
13 Son (phonetic), excuse me, to a large number of people to
14 including yourself subject, executive committee approval form
15 Serta term loan.

16 Do you recognize this?

17 A Yes.

18 MR. EHRLICH: Your Honor, I would move this document
19 in evidence, 365 Defendants.

20 THE COURT: Thank you.

21 Any objection?

22 MR. RUSINZYK: No, Your Honor.

23 THE COURT: Thank you, it's admitted.

24 (Exhibit 365, ECF 254-66 received in evidence.)

25 BY MR. EHRLICH:

1 Q Now, Mr. Kwon, if you could turn to the attachment to
2 this email to the very first page. Can you explain to the
3 Court what this is?

4 A Yes, so this is the official approval form. After you
5 receive approval from the investment committee, this is the
6 document that -- documents, I'm sorry. And this one was
7 official authority for us to buy \$150 million of par first
8 lien term -- sorry -- par value first lien term loans in Serta
9 Simmons at a price (indiscernible).

10 Q And did that price target decline because due to the
11 pandemic?

12 A Yes, it did.

13 Q And if we go to the middle of the second paragraph, it
14 says, "The investment team has conducted diligence on these
15 industry head winds and production declines and do not believe
16 these challenges impair the franchise nature of Serta."

17 So had your investment thesis fundamentally change
18 between November and March?

19 A Not a long-term thesis, but again the short-term impact
20 of COVID needed to be incorporated.

21 Q And was this approval granted?

22 A It was.

23 Q And did Apollo then, in fact, then go out into the market
24 and buy 150 million in term loans?

25 A Yes, yes, we did.

1 Q And it says here below the description, "Counterparty
2 open market transaction." What did you understand that to
3 mean?

4 A That the avenue of which we were going to buy term loans
5 was going to be not the company, but in the old market,
6 through brokers in our (indiscernible).

7 Q Now by the end of March, had you successfully acquired
8 this amount of term loan?

9 A I'm sorry, what was the tender?

10 Q End of March?

11 A I can't remember how much we purchased. We did start
12 purchasing.

13 Q If I could ask you to turn to Tab 7 in your binder,
14 Mr. Kwon?

15 MR. EHRLICH: And Mr. Carlock, if I could ask you to
16 please Debtor's Exhibit 43. It's ECF 861-37 in the main case.

17 Mr. Kwon, this is an email from a gentleman named David
18 Sambur to yourself dated March 27, 2020. Who is Mr. Sambur?

19 A Mr. Sambur is the co-head of the private equity group at
20 Apollo.

21 Q And you write to him on March 27, "We picked up 9 million
22 base today. We're at 140 million total. Can represent close
23 to 150 million on the call."

24 So do you believe by the end of March you had acquired
25 close to 150 million in term loan?

1 A Yes, as of March 27th, yes.

2 Q Now around the time that Apollo started acquiring Serta
3 term loan in March 2020, did Apollo try to engage with the
4 company at all?

5 A What's the time period?

6 Q In March of 2020?

7 A I believe so.

8 Q And is there -- we refer to Mr. Cheong (phonetic) on your
9 team earlier. Did Mr. Cheong try to reach out to the company?

10 A Yes.

11 MR. EHRLICH: And if I could ask you, Mr. Carlock,
12 to bring up Debtor's Exhibit 358, document 254-59 in the
13 adversary?

14 BY MR. EHRLICH:

15 Q This is an email --

16 A Which tab?

17 Q Excuse me, I'm sorry about that, Mr. Kwon. It's Tab 5.

18 This is an email chain that is between two individuals at
19 Serta Simmons. But if you turn to the last page, you will see
20 an email from Mr. Cheong to Ms. McGuffy. Do you see that?

21 A Yes.

22 Q First of all, do you recognize this email?

23 A I do.

24 MR. EHRLICH: We would move exhibit -- Defendant's
25 358 into evidence.

1 THE COURT: Any objection?

2 (Pause in the proceeding.)

3 MR. RUSINZYK: I'll object to hearsay reasons.

4 FEMALE SPEAKER: I'm sorry?

5 THE COURT: Any response?

6 MR. EHRLICH: I really want to show the fact that it
7 was sent, not for the truth of the email.

8 THE COURT: The objection is sustained.

9 BY MR. EHRLICH:

10 Q Okay, well let me ask you this, Mr. Kwon: Do you recall
11 instructing Mr. Cheong to reach out to the company?

12 A Yes.

13 Q And do you know why Mr. Cheong was reaching out to the
14 company? For what reason?

15 A Yeah, so we had done a lot of work on the company and
16 industry, but we had never been able to engage with the
17 company. And we were buying their loans and we wanted to
18 reach out to let them know that we were you know, a creditor
19 with them.

20 We wanted to be supportive. This was a tough time that
21 they were going through. And if we could share -- if there
22 was anything that we could to help in terms of sharing what
23 we're seeing in other customer businesses, a company that we
24 owned or if there's just anything that we could do to support
25 them, that's why we reached out.

1 Q And did the company respond to that outreach?

2 A Not really.

3 Q Well did they just not respond or did they tell you
4 something?

5 A They responded, but they not want to engage.

6 Q Now after Apollo began purchasing first lien Serta debt
7 again in March of 2020, did there come a time that Apollo
8 started talking to other holders of first lien Serta first
9 lien loans?

10 A Yes.

11 Q About your holdings in Serta term loans?

12 A Yes. Yes, and also just kind of sharing our perspective
13 on the industry, COVID, the economy, Serta Simmons the
14 company, yeah.

15 Q And who did you begin speaking with about our holdings in
16 Serta term loan?

17 A The firms were Angelo Gordon and Gamut.

18 Q And how did it come to be that that dialogue got started?

19 A As I recall they were inbounds into Apollo. They had
20 heard that we were purchasing term loans in the market and
21 wanted to reach out to just establish a --

22 Q And what was the purpose of coming together, at least in
23 the first instance?

24 A In the very initial instance was, again, we had done a
25 lot of work on the sector, you know, Gamut and Angelo do

1 similar rigorous underwriting. So, it was to kind of just
2 share perspectives on the industry, the company, state of --
3 state of the world essentially.

4 And then after that it involved into, well, we're lenders
5 of the company, they were as well. And then just sharing
6 thoughts on that.

7 Q Now, at some point did this group engage advisors in
8 connection with its holdings of Serta Simmons?

9 A We did.

10 Q Who did you engage?

11 A We engaged PJT and Hoyt.

12 Q And what was the purpose of engaging advisors?

13 A I think at that point in time, again the company was
14 going through a significant period of destruction. And they
15 were in the liquidity crunch, you know, again given their
16 revenues were impacted because their outlets were shut.

17 So they were facing a liquidity short fall and they were
18 reaching out to potential groups to get a solution for the
19 liquidity. Also at the same time, I believe at that point
20 they were looking to potentially capture discount in the
21 market just given where the term loans were trading.

22 Q And did Apollo continue to buy term loan in April of
23 2020?

24 A Yes.

25 Q And why did you do that?

1 A We had the authority to continue buying. Our investment
2 thesis still remained intact. So we continued to buy because
3 we thought the opportunity was the right risk just for return
4 for investment.

5 Q And did there come a time, Mr. Kwon, that Apollo entered
6 into an NDA with Serta Simmons?

7 A Yes, our group did.

8 Q And that included Apollo?

9 A Yes.

10 Q And did there come a time that the company solicited
11 proposals for restructuring from your group?

12 A Yes.

13 Q And do you recall generally the nature -- well, let me
14 ask you this: Did the company propose an illustrative
15 transaction structure?

16 A Yeah, to my recollection, they provided a structure that
17 they were looking to accomplish. So they provided the initial
18 structure.

19 Q And what were the broad contours of the structure that
20 they provided?

21 A It was to move collateral through the provisions that we
22 discussed. Through investment baskets into various new
23 entities that we created and to raise debt at those new
24 entities and also exchange loans into those entities --
25 recapture discount.

1 Q And did your group, in response to that request for
2 proposal, in fact make a proposal to Serta?

3 A We did. We responded to their initial request.

4 Q And if I could ask you, Mr. Kwon, please, turn to Tab 12
5 of the -- of your binder.

6 A Yeah.

7 Q And do you see here an email from a gentlemen at PJT.

8 MR. EHRLICH: This is for the Record, Defendant's
9 82; it's document 248-82.

10 BY MR. EHRLICH:

11 Q Do you see an email from someone at PJT. That was your
12 advisor?

13 A Yes, that's correct.

14 Q To someone at Evercore, Mr. Shah. Do you see that?

15 A Yes.

16 Q And who is Mr. Shah?

17 A He was the advisor for the company.

18 Q And did your group direct Mr. Cajigas (phonetic) to send
19 this email?

20 A Correct.

21 Q And if you turn to the next page, do you see a financing
22 proposal?

23 A We do, yes.

24 Q And do you recognize this document?

25 A Yes.

1 MR. EHRLICH: And I would move Defendant's 82 into
2 evidence.

3 THE COURT: Any objection?

4 MR. RUZINSKY: No, Your Honor.

5 THE COURT: It's admitted.

6 (Exhibit 82, ECF 248-82, received in evidence.)

7 BY MR. EHRLICH:

8 Q Now is this the proposal your group authorized to be sent
9 to the company on or about May 4th of 2020?

10 A To my recollection, yes.

11 Q And if we turn to the next page, which is 4 of 18 on the
12 ECF, page 2 of the slide deck, can you describe for the Court
13 at a high level the indicative financing proposal that your
14 group offered to the company?

15 A Sure. You have to excuse me. It was some time ago. It
16 was -- it was the creation of two entities. One is a
17 non-guarantor subsidiary. The other is an unrestricted
18 subsidiary.

19 The creation of those two entities and the framework was
20 to transfer collateral using the provisions in the credit
21 agreement specifically the missing baskets, to transfer
22 collateral into those entities and then to raise debt at those
23 various entities, 200 million of which was to provide the
24 company what we call new money, so fresh capital, to help them
25 with the liquidity crisis.

1 And the remaining was to exchange our loans at a discount
2 to help the company capture discount and delever the company
3 and exchange those loans into those non-guarantor and new
4 un-restricted subsidiaries.

5 Q Now, Mr. Kwon, did the company accept this proposal?

6 A No, they did not.

7 Q And did a negotiation and exchange of term sheets ensue?

8 A Yes.

9 Q And roughly speaking, how many term sheets were exchanged
10 back and forth between the company on the one hand and your
11 group in the other?

12 A Roughly?

13 Q Roughly.

14 A A few.

15 Q And how long did that exchange -- the process the
16 exchange of term sheets continue?

17 A When was this, May? I think we're maybe two weeks, maybe
18 three weeks. But a short period of time.

19 Q Now if I could direct you -- your attention to Tab 16 in
20 your binder, which is marked as Debtor's Exhibit 303. Did you
21 submit a Declaration earlier in the early stage of this case?

22 A I'm sorry, I missed the tab.

23 Q It's Tab 16. Did you submit a Declaration early in this
24 case?

25 A I did.

1 Q And did you attach to that Declaration a series of term
2 sheets that were exchanged between your group on the one hand
3 and the company on the other?

4 A That's correct.

5 Q Okay. And if we turn, for instances, to page 10 of 52.

6 A (Indiscernible).

7 Q Yep, do you recognize this?

8 A Yes.

9 Q And what is it?

10 A This is a term sheet proposal for -- it's one of the term
11 sheet proposals offered by the company and on it looks like
12 May 19th.

13 MR. EHRLICH: And Your Honor, I would offer
14 Debtor's 303.

15 THE COURT: Any objection?

16 MR. RUSINZKY: Your Honor, I have no objection to
17 the term sheets that are attached. I do have an objection to
18 the declaration.

19 MR. EHRLICH: And that's fine. We happy to
20 reformulate the exhibit as simply the term sheets.

21 THE COURT: If you'll just give me -- if you guys
22 can agree on the page numbers I'll just partially rip the
23 exhibit.

24 MR. EHRLICH: We're going to have, Your Honor, at
25 the conclusion of the case, a series of stipulated exhibits.

1 And what we'll do is we will include the relevant pages in
2 that stipulation, if that's okay with Your Honor.

3 THE COURT: Certainly. Then I'll admit that portion
4 of 303, that reflect or that contain the series of term
5 sheets.

6 (Exhibit 303, term sheets only, received in evidence.)

7 MR. EHRLICH: Thank you, Your Honor.

8 THE WITNESS: And this is for the non-guarantor, if
9 necessary.

10 MR. EHRLICH: Thank you.

11 BY MR. EHRLICH:

12 Q Now if we turn ahead, Mr. Kwon, to page 30 of 52, do you
13 recognize this document?

14 A Yes, I do.

15 MR. EHRLICH: And if we look at the top of the page,
16 Mr. Carlock?

17 BY MR. EHRLICH:

18 Q Do you see the date on that document, Mr. Kwon?

19 A Can you say that one more time?

20 Q Yeah, do you see the date on that document?

21 A Yes, it looks like it's May 30th.

22 Q And do you know if that's the last term sheet that your
23 group sent to the company over this negotiation that began a
24 few weeks earlier?

25 A I can't recall. I have to kind of flip to the series of

1 the term sheets, but around end of May was when our last term
2 sheet was signed.

3 Q And if you go a few pages beyond that to page 48 of 52,
4 Mr. Kwon. Do you recognize this document?

5 A I'm sorry, Mr. Ehrlich, what page?

6 Q 48 of 52.

7 A Yes, I do.

8 Q And when is this document dated?

9 A Looks like June 3rd, 2020.

10 Q And do you know if there were any further term sheets
11 exchanged after this date?

12 A I don't believe so.

13 Q What happened in the negotiation after you received this
14 term sheet?

15 A To my recollection, we had a call with the company, their
16 sponsor and advisor. Basically all hands call and tried to
17 get to an agreement on the broader terms -- not the finer
18 terms, but the broader issues that were still outstanding.

19 That's what happened.

20 Q And was there any further negotiation after that call?

21 A No, not after the call.

22 Q What happened next?

23 A After the call the other side went dark. And a few hours
24 thereafter, we had heard that they were executing a deal with
25 another proposal -- specifically the other person lenders.

1 Q Now at this point in time, Mr. Kwon, do you have any
2 certainty as to what the final agreement between -- if your
3 group and Serta had reached one, what it would have looked
4 like?

5 A I'm sorry can you repeat it?

6 Q At this point in time, June 3rd, June 4th of 2020, do you
7 have any certainty as to -- if you had reached an agreement
8 with Serta what it would have looked like?

9 A No.

10 Q Why not?

11 A I would characterize this still at being at the
12 preliminary stages. These proposals were non-binding, subject
13 to a significant amount of diligence -- both business
14 diligence, people diligence. So, these were close to
15 executing them.

16 Q One element of the proposal that was included was
17 identifying collateral that might be loaned against, right,
18 Mr. Kwon?

19 A Yes.

20 Q And had that collateral been finalized?

21 A No.

22 Q Had it been valued?

23 A Not to my recollection.

24 Q Another element of the potential transaction was an
25 exchange of loans. Had the company and your group agreed on

1 exchange rate?

2 A To my recollection, no.

3 Q And this proposal would have had an element of new debt,
4 correct?

5 A Correct.

6 Q And had there been any agreement about the pricing of
7 that debt?

8 A To my recollection, no.

9 Q Had you begun any legal documentation of this proposal?

10 A No.

11 Q Now while you were in negotiating with Serta in May of
12 2020, did Serta ever ask your group to include any other
13 lenders?

14 A Not to my recollection.

15 Q And did you reach out to any other lenders to seek to
16 include them in your group as you were negotiating in May of
17 2020?

18 A No.

19 Q Why not?

20 A This is during May?

21 Q Yes.

22 A So in May we were bound to the NDA, confidentiality
23 agreement that we had to place. And I believe that restricted
24 our ability to talk to other lenders.

25 Q Now you did have a conversation in May, Mr. Kwon, -- did

1 you have a conversation in May, I should say, with Eaton
2 Vance?

3 A I did, yes.

4 Q And if I could ask you to turn to Tab 13 in your binder.
5 And that's Defendants Exhibit 146. It's Document 250-48 in
6 the adversary.

7 And this is an email between someone named Patrick
8 Daniello and you, dated May 28th, 2020. Do you see that?

9 A I do, yes.

10 Q And it says, "Theo, sorry for the delay" -- first of all,
11 do you know if Eaton Vance had reached out to Apollo or Apollo
12 had reached out to Eaton Vance?

13 A No, this was an in bound. So they reached out to a
14 partner of mine.

15 Q Okay. And it says here, "Happy to chat today. I know we
16 were both under NDA and know we want to respect that, but I
17 think we can at least introduce ourselves and chat very high
18 level."

19 Do you see that?

20 A Yes.

21 Q And did you, in fact, speak to Mr. Daniello on or about
22 this date?

23 A On or about, yes.

24 Q And do you recall that conversation?

25 A I do.

1 Q And what was the sum and substance of the conversation?

2 A I would say actually that this email sums it up pretty
3 well. It was a very short conversation. We were very
4 respectful of the NDA that we had in place.

5 And like I said, it was very short. He wanted to
6 introduce himself to me and likewise to him and we just said
7 let's keep an open dialogue on going.

8 There really wasn't much of substance.

9 Q Now you said earlier, Mr. Kwon, that you learned that
10 Serta had elected to pursue a transaction with a different
11 group of lenders, right?

12 A Yes.

13 Q And was Apollo ever invited to participate in that
14 transaction in any way?

15 A Not to my understanding.

16 Q And what did you learn about the proposal -- well, first
17 of all how did you learn about the fact that the company had
18 made that decision to go a different direction?

19 A Yeah, as I recall happened that after the negotiations
20 stopped abruptly. I believe our group -- not us, but our
21 group had found out that they were doing a transaction with
22 another company. So we had learned out about it from others.

23 Q And did you ultimately learn the terms of the transaction
24 that was done?

25 A You mean at that point in time?

1 Q Well first immediately.

2 A Immediately, no. Ultimately, yes, just because.

3 Q And what was your reaction when you learned the terms of
4 the transaction?

5 A Very surprised, very shocked.

6 Q Why were you surprised and why were you shocked?

7 A A deal like this, to my knowledge, had not been done.
8 This was a very novel, new deal. Pretty ground breaking, and
9 you know the general markets felt that way.

10 This was one where the waterfall was re-engineered.
11 Collateral was moved, but the waterfall was re-engineered so
12 that our first lien claims were not first lien any more.

13 Q And was this type of transaction the type of transaction
14 that you diligence when you were doing your work in 2019
15 reflected in Exhibit 15?

16 A It was not reflected.

17 Q And why wasn't it reflected?

18 A Because we had not seen a transaction like that before.
19 Not where the waterfall was protected. And -- but, however,
20 moving collateral, creating unsubs, and non-guarantor subs and
21 doing dropdown transaction.

22 Like I said, that was pretty familiar in the market at
23 the point in time. So we took, like I said, our market
24 experience and incorporated what we had seen to be, you know,
25 pretty frequent in liability management transaction like that.

1 We had not seen a transaction like this. This was, like
2 I said, very novel, very different.

3 Q Now Apollo is a private equity sponsor, right, Mr. Kwon?

4 A Yes.

5 Q And so it is the primary owner of portfolio companies; is
6 that correct?

7 A Correct.

8 Q Do those portfolio companies borrow through loan
9 agreements in the market?

10 A Yes, they do.

11 Q And in your experience, has any of those companies needed
12 to do a restructuring transaction?

13 A Yes.

14 Q And have you had personal involvement in any such
15 transaction?

16 A I did, yes.

17 Q Which one?

18 A Claire Stores.

19 Q And what was the nature of the transaction there?

20 A As I recall it was a dropdown transaction where we
21 created various new subsidiaries and we raised debt and
22 exchanged debt through those series. Debt transaction when we
23 did it, was open to all members.

24 Q Now, your -- the transaction that you had been
25 negotiating with Serta, at the time was just on the behalf of

1 your group, correct?

2 A That's correct.

3 Q Was there anything that prevented it from potentially
4 being open to others?

5 A Not --

6 Q In the transaction structure?

7 A Not that I'm aware of. Nothing to prevent it.

8 Q Now are you aware that the Plaintiffs in this case have
9 asserted that certain transactions Apollo has participated in
10 are similar to the June 2020 transaction?

11 A I'm aware.

12 Q And do you recall being asked at your deposition about a
13 couple of those?

14 A Yes.

15 Q And do you recall what they are?

16 A They were two specifically, Mytel and Envision
17 (phonetic).

18 Q And when in time did those transactions occur in relation
19 to when the Serta transaction occurred?

20 A You can keep me honest, but the Serta transaction
21 occurred call it late June 2020. And Mytel and Envision, to
22 my understanding occurred in 2022. So call it roughly two
23 years after the Serta.

24 Q And did you have any personal involvement in those
25 transactions with respect to Apollo?

1 A No, I did not.

2 Q Based on your knowledge, did Apollo play a roll in
3 structuring or leading those transactions?

4 A No. To my understanding we were merely a participant.

5 Q Now the Plaintiffs in this case say, in essence, the
6 transaction that we were negotiating that ultimately was not
7 finalized was in substance the same thing they were doing.
8 That we were basically doing the same thing.

9 What's your reaction to that statement?

10 A I don't agree with that. How you execute it matters.
11 That the transaction that we were looking at, like I
12 mentioned, was a transaction that the market had generally
13 seen and had grown accustomed to.

14 They were utilizing highly negotiated provisions and
15 credit agreement that quantified how much collateral that a
16 company can move from one entity to another.

17 And corporations, whether distressed or in good standing
18 or stressed have used those provisions to do just that, move
19 collateral. And so our transaction was based off of, you
20 know, similar thing.

21 This transaction was significantly different. Like I
22 mentioned, one, we had not seen it in the market. And then
23 two, this transaction did not move any collateral. The
24 collateral stayed in place. Fundamentally stayed in place.

25 This transaction, though, did re-engineered the waterfall

1 where our first lien loans, which as we mentioned in our memo,
2 top of the capital structure which is how us and our investors
3 got comfortable with the risk was now near the bottom of the
4 capital structure.

5 We were first lien loans when we bought them in March to
6 May 2020. After this transaction, we were -- what's the
7 right -- there was first lien first out. First lien second
8 out. There was a first lien third out tranche that was
9 created. And then we were first lien fourth out.

10 So even though we were first lien in name, we were fourth
11 out in substance in technical.

12 Q And were those tranches superior to you claiming on the
13 same collateral?

14 A Same collateral, yes. Through the waterfall, we are
15 literally, you know, one of the last in line.

16 Q And when you were underwriting the deal, how important
17 was your first claim on the collateral to Apollo as it was
18 making its investment decision?

19 A Fundamental. Fundamental. That's how we price our risk.
20 That's how we price the target prices for the loans we want to
21 buy. All of our returns, all of our projections were based
22 off an understanding that we were first in debt.

23 Q Now did there come a time after the June 2020 transaction
24 was announced that any rating agencies took action on the
25 Serta first lien loans that you held?

1 A My understanding, yes.

2 Q And what rating action do you recall?

3 A I remember pretty immediately thereafter there was a
4 Moody's report that came out and downgraded the company.

5 MR. EHRLICH: If I can ask you, Mr. Carlock, to
6 bring up Debtor's Exhibit 239?

7 THE WITNESS: Where's that?

8 BY MR. EHRLICH:

9 Q It's the final tab in your binder, 17.

10 (Pause in the proceeding.)

11 Q And if we go to page 2 of 10. Do you recognize this
12 document, Mr. Kwon?

13 A Yes, I do.

14 Q And was this something you read at the time?

15 A Yes.

16 Q And I'd like to direct your attention to the next page of
17 the document where it says, "Additionally Moody's believes the
18 term loan lenders who do not consent to the contractual
19 potentially be left with little or no remaining collateral
20 coverage in Serta Simmons, as well as in a position that is
21 supported -- subordinated to new higher priority debt."

22 And Mr. Kwon, that statement about being "left with
23 little or not collateral coverage" was that significant to you
24 as you thought about this transaction?

25 A Absolutely. Yes.

1 Q Why?

2 A Because that's not what we expected. We expected first
3 lien on the collateral piece.

4 Q And why was the absence of collateral important,
5 Mr. Kwon?

6 A Sorry, the absence?

7 Q Yeah, the fact that there'd be little or no remaining
8 collateral for your loans. Why did that matter?

9 A I mean, that's fundamental to any loan, the underlying
10 value of collateral.

11 Q And what is the effect of collateral if you end up in a
12 courtroom like this one day?

13 A I think you're seeing it play out. I believe under the
14 restructuring plan, our class as it stand right now, if we
15 voted in favor of the plan, would receive 4 percent of the
16 equity. And the other class, the favorite lenders, are
17 receiving close to 70 percent of equity.

18 So there's a vast fundamental difference of recovering
19 value between their class and ours.

20 Q Is so that even though your loans are secured by the same
21 collateral?

22 A Same collateral. We are fundamental different in the
23 waterfall.

24 Q And is that what you thought you were getting when you
25 bought these loans in March of 2020?

1 A Absolutely not.

2 Q Thank you, Mr. Kwon. I have nothing further.

3 THE COURT: All right thank you.

4 Anyone else, excuse me, that opposes confirmation
5 and questions for Mr. Kwon?

6 Mr. Liberman.

7 (Pause in the proceeding.)

8 MR. LIEBERMAN: Neil Lieberman, Schuster and
9 Goldberg on behalf of LCM.

10 CROSS-EXAMINATION

11 BY MR. LIEBERMAN:

12 Q Good morning, Mr. Kwon.

13 A Good morning.

14 Q Have you and I ever spoken before this?

15 A Never.

16 Q Has Apollo ever discussed LCM's litigations against the
17 Plaintiff's with anyone at LCM?

18 A Never -- not to my understanding.

19 Q Great, thank you.

20 Is Apollo contributing directly or indirectly to any of
21 the funding of LCM's litigation against any of the Plaintiffs?

22 A Not to my understanding.

23 Q Does Apollo know who, if anyone, is funding LCM's
24 litigation?

25 A Not to my understanding.

1 Q Does Apollo have any knowledge regarding the funding of
2 LCM's litigation against any of the Plaintiffs?

3 A I'm sorry, can you repeat the question?

4 Q Sorry. Does Apollo have any knowledge regarding the
5 funding of LCM's litigation against any of the Plaintiffs?

6 A Not to my understanding.

7 Q Does Apollo have any reason to believe that LCM is not
8 funding its own litigation?

9 A Not to my understanding.

10 Q Thank you very much.

11 THE COURT: All right, anyone else?

12 Mr. Millar?

13 MR. MILLAR: Oh, no. Thank you, Your Honor.

14 THE COURT: Mr. Rusinzky, any Cross?

15 MR. RUSINZKY: Yes, Your Honor.

16 THE COURT: All right, please let me switch over.

17 THE WITNESS: Judge, can I just stand up and stretch
18 my legs?

19 THE COURT: Absolutely.

20 (Pause in the proceedings.)

21 THE WITNESS: Thank you.

22 THE COURT: Can we get Mr. Kwon a fresh bottle of
23 water?

24 Let me ask you, Mr. Kwon, do you need five minutes
25 just to walk about the floor would that help you?

1 THE WITNESS: Yeah, if you don't mind.

2 THE COURT: I don't mind at all. Why don't we do
3 this, can we come back at 10:00 o'clock?

4 (No audible response.)

5 THE COURT: All right we'll be adjourned until
6 10:00 o'clock.

7 THE CLERK: All rise.

8 (Recess taken from 9:55 a.m. to 10:01 a.m.)

9 AFTER RECESS

10 (Witness resumes stand)

11 THE COURT: All right. We are back on the Record in
12 the jointly administered cases under 23-90020, Serta Simmons
13 Bedding, LLC.

14 Mr. Ruzinsky, I've transferred control to your IT
15 person. I think we're ready to go.

16 MR. RUZINSKY: Thank you, Your Honor.

17 May I approach the witness just with some binders?

18 THE COURT: Absolutely. Thank you.

19 (Participants confer)

20 CROSS-EXAMINATION

21 BY MR. RUZINSKY:

22 Q Mr. Kwon, good morning.

23 A Good morning.

24 Q You would agree with me, would you not, that Apollo has
25 extensive experience in the syndicated credit market?

1 A Yes.

2 Q And Apollo has been a party to many syndicated credit
3 agreements, correct?

4 A Correct.

5 Q So many that you couldn't quantify that for us here
6 today, right?

7 A (No audible response).

8 Q I'm going to have to ask you to speak up a little louder,
9 right into --

10 A No.

11 Q -- the mic.

12 A No.

13 Q Thank you. Okay.

14 And Apollo funds have upwards of \$100 billion or more
15 invested in credit instruments alone. Isn't that correct?

16 A Upwards of 100 billion, yes.

17 Q Plus hundreds of billions of dollars in additional assets
18 under management, right?

19 A Close to 600.

20 Q Apollo employs hundreds of investment professionals,
21 correct?

22 A (No audible response).

23 Q And is it fair to say that Apollo is a sophisticated and
24 repeat player in the credit markets?

25 A (No audible response).

1 Q And you would agree with me, would you not, that Apollo
2 competes with a lot of the Plaintiffs in this case?

3 A Correct.

4 Q And you would absolutely agree with me that Apollo works
5 every day to be a fair, ethical, and responsible partner,
6 correct?

7 A Absolutely.

8 THE COURT: Mr. Kwon, can I ask you just to get --
9 sit a little closer to the microphone?

10 THE WITNESS: Yes.

11 THE COURT: Thank you. That will help everybody.

12 THE WITNESS: How is this?

13 THE COURT: That's perfect --

14 MR. RUZINSKY: Yes.

15 THE COURT: -- if you can --

16 THE WITNESS: Okay.

17 THE COURT: -- maintain that.

18 BY MR. RUZINSKY:

19 Q Mr. Kwon, you would also agree with me, would you not,
20 that Apollo always acts with integrity and sound ethics --
21 excuse me -- has always acted with integrity and sound ethics
22 in participating in the Ad Hoc Group proposal, that alternate
23 2020 transaction?

24 A Yes.

25 Q And in negotiating that Ad Hoc Group proposal transaction

1 that never got consummated, you would also agree with me that
2 Apollo, at all times, acted in good faith.

3 A Yes.

4 Q Before purchasing the first lien debt that Apollo now
5 owns, it did a lot of significant due diligence, right?

6 A Correct, yes.

7 Q And that took place for several years before the 2020
8 purchases, correct?

9 A Correct.

10 Q You researched Serta Simmons, right?

11 A Correct.

12 Q You researched the industry.

13 A Correct.

14 Q You did a really deep underwrite, correct?

15 A Correct.

16 Q And Apollo takes pride in its diligence, right?

17 A Correct.

18 Q And as part of your deep underwrite, you carefully
19 reviewed the credit agreement, right?

20 A That's correct.

21 Q So, on January 1st, 2020, Apollo owned no Serta Simmons
22 debt. Is that correct?

23 A Can you repeat the date, please?

24 Q Date January 1, 2020.

25 A Yeah. We did not own any debt.

1 Q Okay. And the 2020 purchases of Serta 1-L debt began in
2 March of 2020, correct?

3 A (No audible response).

4 Q You knew there was a risk at the time of those purchases
5 that the debt might not be repaid in full, correct?

6 A Correct.

7 Q In fact, you thought it was more likely than not that
8 Serta Simmons would have to go through a bankruptcy
9 restructuring process, correct?

10 A Right.

11 Q And that was the base case you were talking about
12 earlier, correct?

13 A Correct.

14 Q So, even though you thought a bankruptcy restructuring
15 process was the likely result, Apollo kept purchasing Serta
16 debt in the Spring of 2020, correct?

17 A Correct.

18 Q And by March 2 -- March 27, 2020, Apollo owned \$140
19 million face amount of Serta Simmons debt, correct?

20 A That's correct.

21 Q And by May of 2020, Apollo owned \$192 million of Serta
22 first lien debt, correct?

23 A Sorry. What was the date again?

24 Q May of 2020.

25 A That sounds about right, yes.

1 Q And 192 million face amount was 10 percent of the 1-L
2 debt. Is that correct?

3 A Yes.

4 Q And that was purchased at an average cost of about
5 45 percent to the face of the debt, correct?

6 A That sounds about right.

7 Q By late March 2020, Apollo had entered into ongoing
8 discussions with two other companies, Gamut and Angelo Gordon,
9 correct?

10 A (No audible response).

11 Q And the plan was to work together and engage advisors in
12 connection with Serta Simmons, right?

13 A I'm sorry. Can you repeat the question?

14 Q Sure. The plan was to work together and engage advisors
15 in connection with Serta Simmons, right?

16 A Can you clarify what you mean by the "the plan"?

17 Q Your intent at that time was to work together and engage
18 advisors, Apollo, Angelo Gordon, and Gamut.

19 A Not initially. Like I said, you know, initially, we were
20 just, you know, sharing notes and perspectives. That did
21 evolve that way, just given the circumstances of the company.

22 Q And when do you believe that commenced?

23 A It moved pretty fast, but it was, call it "late March."

24 Q All right. And Apollo began splitting purchases of Serta
25 1-L debt with Gamut, correct?

1 A Yes.

2 Q And the split was 70 to Apollo, 30 for Gamut?

3 A To my recollection, yes, for certain purchases.

4 Q And by the end of March 2020, you began exploring
5 potential transaction structures in connection with Serta
6 Simmons, correct?

7 A I'm sorry. Can you repeat the date again?

8 Q The end of March 2020.

9 A I believe so.

10 Q You would agree with me that, at all times, the group
11 that Apollo was a party to -- that three-party group, the Ad
12 Hoc Group, Apollo, Gamut, and Angelo Gordon -- it only
13 consisted of those parties and there was none others. Is that
14 correct?

15 A That's correct.

16 Q The credit agreement, the 2016 credit agreement for Serta
17 Simmons, was rigorously scrutinized by Apollo, correct?

18 A Correct.

19 Q And you especially scrutinized Serta Simmons' ability to
20 layer or move assets or reduce the value of loans that you
21 would be buying, correct?

22 A Correct.

23 Q And you concluded that the credit agreement, the 2016
24 credit agreement, was very loose, right?

25 A Correct.

1 Q And by "loose," you mean company friendly, right?

2 A Company friendly with the respect to the ability to move
3 assets and execute liability management transactions that we
4 had seen in the market, yes.

5 Q So is that the only way it was company friendly?

6 A That -- when we describe it was "sponsor friendly,"
7 "loose," that is in specific reference to those provisions
8 that I mentioned before: Ability to move assets, ability to
9 execute dividends, ability to incur senior debt, those
10 specific provisions because those are based off of, again, our
11 -- our historical experience, as you mentioned, being a
12 prevalent participant in the syndicated markets.

13 (Pause in the proceedings.)

14 Q And at the time that Apollo bought Serta 1-L debt in
15 2020, Apollo understood that a dropdown transaction was
16 possible, correct?

17 A Yes.

18 Q And the dropdown transaction involved setting up a new
19 entity, transferring collateral, and lending against that
20 collateral, correct?

21 A Correct.

22 Q The existing first lien holders in a dropdown transaction
23 would lose priority with respect to claims against any
24 transferred collateral, correct?

25 A That's correct.

1 Q So, as Apollo began making its purchases in 2020, it
2 recognized that transactions might occur where it would lose
3 priority over certain Serta Simmons assets, correct?

4 A (No audible response).

5 Q Now, because the credit agreement was loose, Apollo
6 wanted to drive the process and be aggressive, right?

7 A Can you restate that question?

8 Q Sure.

9 Because the credit agreement was loose, Apollo wanted to
10 drive the process and be aggressive, correct?

11 A I'm sorry. What's that referring to?

12 Q I'm referring to Apollo's approach with respect to Serta,
13 with a loose credit agreement.

14 A Not -- not necessarily.

15 I'm sorry. Can you repeat that question again?

16 Q Sure.

17 MR. RUZINSKY: Let me go ahead and ask Tim if you
18 can please pull up Exhibit 43, Debtors' Exhibit 43. It is
19 ECF 861-37.

20 THE WITNESS: I'm sorry. And --

21 BY MR. RUZINSKY:

22 Q And Mr. Kwon, it will be Tab 2 in the smaller of the two
23 binders that I gave you.

24 A Thank you.

25 Q You're welcome.

1 (Pause in the proceedings.)

2 Q Now this is a couple of emails between you and David
3 Sambur in late March of 2020, correct?

4 A Yes.

5 Q And David Sambur is your colleague at Apollo, right?

6 A Yes.

7 Q And about midway through the first page of this exhibit,
8 Debtors' Exhibit 43, there's an email from you to David
9 Sambur, March 27, 2020, 9:39 a.m. And you sent that email to
10 David Sambur then, right?

11 A Yes, that's right.

12 Q All right. And you received the email that he sent back
13 on March 27th, correct?

14 A Yes.

15 MR. RUZINSKY: Okay. To the extent this is not
16 already admitted, I would offer it for admission.

17 THE COURT: It was talked about, but it was not
18 offered or admitted. So you're moving to introduce the
19 exhibit?

20 MR. RUZINSKY: Yes, I am, Your Honor.

21 MR. EHRLICH: No objection.

22 THE COURT: Any objection? I'm sorry.

23 MR. EHRLICH: No objection, Your Honor.

24 THE COURT: Thank you. Then it's admitted.

25 (Exhibit 43, ECF 861-37, received in evidence)

1 MR. RUZINSKY: Thank you, Judge.

2 BY MR. RUZINSKY:

3 Q Mr. Kwon, if you would please look to about two-thirds of
4 the way down.

5 MR. RUZINSKY: And Tim, if you could please
6 highlight the second bullet point there. There we go.

7 BY MR. RUZINSKY:

8 Q Mr. Kwon, it says -- and this is you emailing David
9 Sambur. It says:

10 "Josh at PJT, they're going to send ideas they had on
11 Serta, but they're thinking about it just like we were, want
12 to be driving the process given loose docs, but be
13 aggressive."

14 Do you see that?

15 A Yes.

16 Q Okay. And this was you describing your -- part of your
17 conversation with Josh at PJT. Is that correct?

18 A That's correct.

19 Q And PJT was the advisor -- one of the advisors for the Ad
20 Hoc Group that Apollo was a part of, right?

21 A That's correct.

22 Q And so you also say here:

23 "Thinking about it just like we were."

24 Right?

25 A Yes.

1 Q Okay. So what Josh at PJT was suggesting was just the
2 way you were thinking about it, right?

3 A Yes. I don't recall what I was thinking about at that
4 time, three years ago, but yes, that's what I stated.

5 Q Well, wouldn't it be what you thought was important
6 enough to write in this email, which is wanting to drive the
7 process, given loose docs, and be aggressive?

8 A I -- I think that the last word is important,
9 "aggressive." I can't recall the specific context -- sorry,
10 the specific context. This could be in relation to --
11 remember, the company had reached out and had specific terms
12 that they were looking for, new money and also capturing
13 discount.

14 This could, on one hand, be taken as we want to be
15 aggressive to hit what the company wants and be constructive
16 to them. It -- that could be how I was messaging this.

17 I don't recall the specifics of this one bullet point in
18 an email three -- three years ago.

19 Q And it could also be just as likely that you wanted to be
20 aggressive in forcing the company to a place where Apollo
21 wanted to be, but the company didn't necessarily want to be,
22 right?

23 A What does that mean?

24 MR. RUZINSKY: Would you please read back the
25 question?

1 STENOGRAPHER: Sure.

2 "And it could also be just as likely that you wanted
3 to be aggressive in forcing the company to a place where
4 Apollo wanted to be, but the company didn't necessarily want
5 to be, right?"

6 (Readback from Stenographer.)

7 THE WITNESS: The reason I'm -- I'm -- I'm
8 questioning that is: Remember, we, at that point in time, had
9 \$150 million in loans, we had less than 10 percent of the
10 loans. I don't understand how we could force the company to
11 be in a place they didn't want to be.

12 This was in reaction to a proposal that they were
13 looking for, the company. There were terms they were looking
14 for, dollar amounts they were looking for to help fund their
15 liquidity. We had no leverage here, so I don't understand how
16 we could be forcing the company to a position that they don't
17 want to be in.

18 BY MR. RUZINSKY:

19 Q So you wanted terms that were favorable to Apollo and the
20 other members of the Apollo Group, right?

21 A That -- that could be one meaning of "aggressive."

22 The other meaning could be we want to be aggressive to
23 make sure we get the company what they want, so they transact
24 with us.

25 Q And sitting here today, you can't tell us which one it

1 is, right?

2 A Yeah. I mean, it could go both ways.

3 THE COURT: So, Mr. Kwon, I'm having a hard time
4 reconciling that. If you could just help me.

5 How is it that you used the term "aggressive," in
6 terms of "give the company what they want"? I mean, if you
7 give the company what they want, how is that being aggressive?
8 You're just giving them what they want.

9 THE WITNESS: "Aggressive" in the context of a
10 competitive bid.

11 THE COURT: Ah --

12 THE WITNESS: So --

13 THE COURT: -- so you didn't want -- you didn't want
14 someone to put something better on the table, that's what you
15 meant by "aggressive," let's go ahead and give them what they
16 want sooner, rather than later, so that nobody else is a
17 player?

18 THE WITNESS: Yeah. I think, for example, you know,
19 they were looking for terms on -- on new money, they were
20 looking for 200 million. You know, cash, at that point in
21 time, was very, very valuable.

22 THE COURT: Got it.

23 THE WITNESS: "Aggressive" could mean hit -- hit the
24 bid on the -- the quantum, 200 million, give them what they
25 want, let's not nickel-and-dime and say we were going to give

1 them 150 --

2 THE COURT: Okay.

3 THE WITNESS: -- or 170 --

4 THE COURT: That's very helpful. Thank you.

5 THE WITNESS: No problem, Judge.

6 MR. RUZINSKY: Thank you, Judge.

7 THE COURT: Sorry for the interruption.

8 MR. RUZINSKY: No problem at all, Judge.

9 BY MR. RUZINSKY:

10 Q Mr. Kwon, by the end of March 2020, Apollo began working
11 with its advisors on proposals that it could offer to Serta
12 Simmons, whereby it would take Apollo's paper, the 1-L debt
13 that Apollo owned, and it would be put in a more senior
14 position, correct?

15 A I'm sorry. I missed the date.

16 Q Late -- the end of March 2020.

17 A Yeah, that's about right.

18 This was, again in reaction to the proposal from the
19 company.

20 MR. RUZINSKY: Tim, would you please pull up
21 Exhibit 48, Debtors' Exhibit 48. It's ECF 861-42.

22 BY MR. RUZINSKY:

23 Q And Mr. Kwon, it's Tab 5 in your binder there.

24 A Thank you.

25 Q You're welcome.

1 (Pause in the proceedings.)

2 Q And Mr. Kwon, this is an email from you to Andrew Jhawar
3 at Apollo, correct?

4 A Correct.

5 Q He's your colleague there?

6 A He is.

7 Q And you sent this email on March 30, 2020, to Andrew
8 Jhawar, correct?

9 A That's correct.

10 MR. RUZINSKY: Your Honor, if this is not already
11 admitted, I would ask that it be admitted.

12 MR. EHRLICH: No objection.

13 THE COURT: Thank you. Let me just check my list.

14 (Pause in the proceedings.)

15 THE COURT: I don't show it as being admitted, so
16 we'll admit 48.

17 (Exhibit 48, ECF 861-42, received in evidence)

18 MR. RUZINSKY: Thank you, Your Honor.

19 BY MR. RUZINSKY:

20 Q And Mr. Kwon, in the first email at the top there, in the
21 second paragraph, you say -- you start by saying:

22 "We updated our Serta models to account for earlier
23 restructuring scenarios."

24 And that was true, right?

25 A Yes.

1 Q All right. And then a couple of lines down --

2 MR. RUZINSKY: Tim, would you highlight that,
3 please? That -- the sentence start -- yeah, that's it.

4 BY MR. RUZINSKY:

5 Q And then you say, Mr. Kwon:

6 "We're starting to work with PJT and PW to think through
7 cap structure, liquidity solutions we can offer Serta that
8 puts our paper in a more senior position."

9 Correct?

10 A Correct.

11 Q And "our paper" was the 1-L debt that Apollo held, right?

12 A Yes, plus the new money, as well. That's -- you know,
13 that's included there, as well.

14 Q Okay. Okay. But you wanted to be senior to other
15 lenders, right? That was important to Apollo.

16 A The new money was definitely important. Putting in new
17 capital at this point in time to be senior was important to
18 use.

19 And then the -- the "our paper," current position, we
20 were looking at options, one of which included being more in
21 the senior position, again.

22 Q And by this time, you understood that, you know, a Serta
23 -- the odds of a Serta Simmons bankruptcy was somewhat
24 greater.

25 A Yes. This is in the middle of the pandemic. As we will

1 recall --

2 Q Uh-huh.

3 A -- that was a very fluid time.

4 Q So you were open to a restructuring transaction with
5 Serta that created structurally senior debt, right?

6 A I'm sorry. Can you repeat the question?

7 Q So you were open to a restructuring transaction with the
8 Debtor, Serta Simmons, that created structurally senior debt.

9 A Yes.

10 MR. RUZINSKY: Tim, would you please pull up
11 Exhibit 53? It's ECF 861-47. That's Debtors' Exhibit 53.

12 BY MR. RUZINSKY:

13 Q And Mr. Kwon, it's Tab 8 in your binder there.

14 A Thank you, again.

15 Q You're welcome.

16 (Pause in the proceedings.)

17 Q And before we get to this exhibit, where we just talked
18 about exchanging structurally senior -- or creating
19 structurally senior debt, that also included exchanging
20 existing debt for structurally senior debt, didn't it?

21 THE COURT: So we lost the exhibit.

22 MR. RUZINSKY: Ah --

23 THE COURT: There we go.

24 MR. RUZINSKY: Thank you.

25 THE WITNESS: Can you repeat the question?

1 MR. RUZINSKY: Sure.

2 BY MR. RUZINSKY:

3 Q Mr. Kwon, when you -- actually, let me get the reading
4 back.

5 MR. RUZINSKY: Thank you.

6 STENOGRAPHER: Let me get it.

7 MR. RUZINSKY: Good.

8 STENOGRAPHER: "Before we get to this exhibit, where
9 we just talked about exchanging structurally senior" -- excuse
10 me -- "or creating structurally senior debt, that also
11 included exchanging existing debt for structurally senior
12 debt, didn't it?"

13 THE WITNESS: Yes, that's correct.

14 MR. RUZINSKY: Okay. So we're on 48 now, Debtors'
15 Exhibit 48. So we're going to flip to that one, or flip back
16 to it.

17 BY MR. RUZINSKY:

18 Q So, Mr. Kwon, Exhibit 48, Tab 5. We're back here.

19 (Pause in the proceedings.)

20 Q Now I'm sorry. I'm back on 53. My mistake.

21 (Pause in the proceedings.)

22 Q Mr. Kwon, Debtors' Exhibit 53 is -- it starts at the top,
23 an email from David Sambur to you and to David Cheong,
24 April 1st, 2020. And below that are emails between you and
25 David Cheong. Is that correct?

1 A Correct.

2 Q So the first sentence of your 7:30 a.m., April 1st, 2020
3 email reads as follows:

4 "An un-sub transaction should help tighten up this
5 leakage to the junior creditors, but the real value in PJT's
6 proposal, which Advent won't go for, is you would jump the
7 other 1-Ls by taking a haircut to face on our paper."

8 Do you see that?

9 A Yes.

10 Q Okay. So, by this time, you had seen a proposal from
11 PJT, correct?

12 A Correct.

13 Q And it involved an un-sub or a dropdown transaction,
14 correct?

15 A Yes.

16 Q And you saw real value in taking a position that's senior
17 to the other 1-Ls, right?

18 A Correct.

19 Q All right. And that's what you -- that's what "jumping"
20 the other 1-Ls is, right? Taking a position senior to the
21 other 1-Ls.

22 A On -- on the collateral that's moved into the
23 unrestricted subsidiary.

24 Q Uh-huh. So you wanted to make sure that you were senior
25 with respect to all that collateral that got moved to the

1 subsidiary, right?

2 A On that collateral, yes.

3 Q Okay. And that was pretty valuable collateral that you
4 wanted moved into that subsidiary, right?

5 A The -- the actual specifics of the collateral was never
6 finalized, but it would have been collateral valuable, yes.

7 Q Right.

8 And what you envisioned was collateral that would be
9 worth multiples of the amount of your new debt that would
10 secure it, right?

11 A What -- what do you mean by "multiples"?

12 Q Two times, three times.

13 A I don't recall the coverage, but I don't think it was
14 multiples.

15 Q You --

16 A It was coverage, but not -- not two times, three times.

17 Q It's -- so it was more than 100 percent. You'd want --
18 you'd want an equity cushion there, --

19 A Yes.

20 Q -- right?

21 A Yes, that's right.

22 Q Okay. And you would do this by taking a haircut to face
23 on Apollo's paper, right?

24 A That's the discount I mentioned that the company was
25 looking for, yes.

1 Q In other words, you would exchange your debt at prices
2 below par in exchange for a more senior position or jumping
3 the other 1-Ls, right?

4 A On the collateral that was moved. I think that part is
5 right. Not on the current collateral.

6 Q And you would do this by taking a haircut to face on the
7 paper.

8 A That's what we were analyzing and assessing.

9 Q So I -- did I understand your testimony on Direct that it
10 was Serta Simmons' request for a dropdown with a debt-for-debt
11 exchange, that wasn't your group's -- your group didn't come
12 up with that, that was Serta's request. Is that right?

13 A To my understanding, that was Serta's request, yes.

14 Q Okay.

15 A Is that volume better, by the way?

16 Q Yes, it is. Thank you.

17 A All right.

18 THE COURT: Certainly. Thank you.

19 BY MR. RUZINSKY:

20 Q But wasn't it, in fact, your group's idea and one that
21 you didn't think that Advent would go for?

22 A Sorry. The -- to my understanding, the company had laid
23 out the framework for a dropdown transaction.

24 Q Well, here you are in this April 1st email, you've got
25 discussion about an un-sub transaction. This is what Apollo

1 wanted. And it characterizes this as "PJT's proposal," which
2 Advent won't go for.

3 And Advent is Serta's sponsor, right?

4 A Well, can I go back? You mentioned "Apollo wanted."

5 Q This -- no, let me -- I'll let you go there.

6 But first, Advent was and is Serta's sponsor, their main
7 equity holder, right?

8 A Correct.

9 Q Okay. All right. And PJT had a proposal by this time,
10 right?

11 A Proposal here might have been just ideas that we were
12 evaluating on our side.

13 Q This --

14 A Now --

15 Q But they didn't say -- I mean, you're not saying PJT has
16 some ideas. You're saying "PJT's proposal." Those are your
17 words, right?

18 A I absolutely said "proposal."

19 Q Well, you know the difference between a "proposal" and an
20 "idea," don't you?

21 A Well, this could have been PJT's proposal inbound into
22 us, not a proposal to the company yet. This was -- in
23 April 1, this was still in ideation phase.

24 Q Okay. Are you sure there was no PJT proposal to Serta at
25 this time?

1 A I'm not sure.

2 Q Okay. But you are sure that there was at least a PJT
3 proposal to your group this time.

4 A Correct.

5 Q Okay. And this was -- and I -- and this was a proposal,
6 whether it was straight to Serta or whether it was to your
7 company, that would have a dropdown transaction with a debt-
8 for-debt exchange, right?

9 A Correct.

10 Q And that you knew or believed that Advent wouldn't go for
11 it, right?

12 A I can't recall why I put that in the parenthetical there.
13 I'm sure there were nuances in this idea that PJT had sent
14 over, that, you know, they -- they would not want to go for.
15 I don't know why -- what that was based off of.

16 Q Well, let's take a look at the words that you used here
17 back in April of 2020. You know, the second part of this
18 sentence, you say:

19 "But the real value in PJT's proposal, which Advent won't
20 go for, is you would jump the other 1-Ls by taking a haircut
21 to face on our paper."

22 Did I read that right?

23 A You did.

24 Q And so doesn't that inform us, doesn't that tell us that
25 what Advent -- what you believe Advent wouldn't go for was

1 jumping the other 1-Ls, "taking a haircut to face on our
2 paper"?

3 A That -- that was my assumption on April 1, at that time.
4 We had not talked to Advent, again, we had not even talked to
5 the company. So this was me responding with my perspectives,
6 it looks like an idea that PJT had sent over to us --

7 Q Well --

8 A -- so giving my assessment of the situation.

9 Q Whether that was just an idea or whether that was an
10 actual PJT proposal to Serta Simmons, you don't know, right?

11 A So this is April 1. I am fairly certain we did not send
12 proposals on or near April 1 to the company. So I believe
13 this is when PJT was sending ideas to us on potential
14 transactions. We had no insight into the state of mind of
15 Advent or the company. Again, this is my assessment, outside
16 in. That's purely it.

17 Q Mr. Kwon, you would agree with me that a -- the Ad Hoc
18 Group that Apollo was a part of eventually exchanged term
19 sheets with Serta Simmons, correct?

20 A (No audible response).

21 Q And in those termsheets, Apollo, as part of the Ad Hoc
22 Group, offered to enter into a dropdown transaction, right?

23 A Correct.

24 Q And that transaction would have given Apollo seniority
25 over non-participating lenders with respect to the transferred

1 collateral.

2 A Not just Apollo. We were part of a group. But yes, on
3 the transferred -- potentially transferred collateral, yes.

4 Q Okay. So, in other words, Apollo and the other members
5 of that group, by doing that, would have jumped the other
6 1-Ls, right?

7 A On the collateral that was potentially transferred, that
8 could have been transferred, yes.

9 Q Well, on the collateral that was transferred, right?
10 That would be transferred. When it's transferred, if this
11 transaction structure was done, this Ad Hoc Group proposal, it
12 would result in jumping the other 1-Ls, which means the 1-Ls
13 not part of this group, right?

14 A Correct. So on the -- on the transferred assets, yes.

15 Q And you would agree with me that, when Apollo was
16 negotiating for that more senior position to jump the other
17 1-Ls, that it was acting in good faith, --

18 A Yes.

19 Q -- right?

20 A In reaction to the company's request, yes.

21 Q And you would agree with me that Apollo was acting
22 ethically when, as part of the Ad Hoc Group, it -- that was a
23 part of, it jumped the other 1-Ls.

24 A Well, we never executed on anything. We -- we were
25 acting ethically in responding to the company with proposals

1 -- to their proposals with, you know, what we thought were
2 proposals that could be -- that could be beneficial for the
3 company.

4 Q And you felt like that proposal that was entirely ethical
5 that you were making to the company, those proposals, right?

6 A Yes.

7 Q There came a time, Mr. Kwon, when the company pushed back
8 on some of the Ad Hoc Group proposals, right?

9 A Yes. Well, sorry. What do you mean by "pushed back"?

10 Q Well, didn't accept them and --

11 A Yep.

12 Q -- countered, --

13 A Yeah.

14 Q -- right?

15 And there also came a time when the Ad Hoc Group,
16 including Apollo, learned that there was competition out there
17 for a transaction with Serta, right?

18 A I believe so, yeah.

19 Q As Apollo saw things, there was a *de facto* gun to its
20 head because, if there wasn't a deal made with Serta by the Ad
21 Hoc Group, then Apollo's position and Apollo's investors'
22 investments would be very negatively impacted, right?

23 A I believe so. The way that the company and advisors had
24 set this up, it was -- yes. If you were -- yes, that's
25 correct.

1 Q Right.

2 And that's the *de facto* gun to the head, right?

3 A Correct.

4 Q You recognized that you had a fiduciary duty to protect
5 your investors' position, right?

6 A Yes.

7 Q So you and the Ad Hoc Group made the proposal that
8 included a dropdown transaction, giving Apollo, Angelo Gordon,
9 and Gamut seniority over nonparticipating lenders with respect
10 to the transferred collateral, right?

11 A Correct.

12 Q And you had testified earlier that, by this time,
13 dropdown transactions were common or familiar in the market,
14 right?

15 A Familiar in the market, yes.

16 Q And when did that start; when did dropdown transactions
17 start coming to the market?

18 A That's a good question. I couldn't give you a specific
19 date.

20 Q What's the first one that you know of?

21 A Claire Stores because I worked on it. That was 2018, I
22 believe.

23 Q How about J. Crew?

24 A I don't know the exact timing of J. Crew.

25 Q But you would agree with me that --

1 A Pre-COVID.

2 Q You would agree with me that J. Crew was a dropdown
3 transaction?

4 A Correct.

5 Q All right. And so you don't recall that J. Crew was
6 2017?

7 A '17, that's correct. So I guess Claire was before that.

8 Q You had mentioned earlier that Claire was 2018.

9 A Yeah. I misremember years. Everything is -- that --
10 there's a lot of blur before COVID. But yes, to my
11 recollection, Claire was before J. Crew.

12 Q Okay. Let's go to Debtors' Exhibit 65, which is ECF
13 862.9. And Mr. Kwon, it's Tab 6 in your binder.

14 A Thank you again.

15 Q You're welcome.

16 So, Mr. Kwon, this is an email from David Sambur to you,
17 and then there is an email below it that you received from a
18 Daniel -- and I'm going to mispronounce this and my apologies
19 -- Cajigas -- C-A-J-I-G-A-S -- from April 11. So your email
20 was April 12; his was April 11.

21 Do you remember receiving -- or actually, you received
22 this email from David Sambur on April 12th, didn't you?

23 A Correct.

24 MR. RUZINSKY: Your Honor, if this is not in
25 evidence already, I would move to introduce it.

1 THE COURT: Any objection?

2 MR. EHRLICH: No objection, Your Honor.

3 THE COURT: All right. Thank you.

4 It's admitted.

5 (Exhibit 65, ECF 862-9, received in evidence)

6 BY MR. RUZINSKY:

7 Q Mr. Kwon, I want to focus your attention on the slide
8 deck. So, on the third page of Exhibit 65, there is a slide
9 deck from PJT Partners dated March 31, 2020.

10 Do you see that?

11 A Yes. Which page, though?

12 Q That's the third page.

13 A 5 of 15?

14 Q Which is 3 of 15.

15 A 3, yes.

16 Q So we've got the March 31, 2020 date of the slide deck.
17 And it shows a proposed transaction structure from PJT. Is
18 that correct?

19 A Correct.

20 Q And if we go to page 4 of 15, under "executive summary,"
21 it says:

22 "The company has two primary structures to raise
23 structurally senior debt."

24 Is that right?

25 A Yes.

1 Q Let's go to page 4 of the slide deck, which is page 6
2 of 15.

3 (Pause in the proceedings.)

4 Q And would you agree with me that the basic subject
5 concerns, ways to raise structurally senior debt?

6 A Yes.

7 Q All right. On the left-hand side of the page, there is a
8 column entitled "Transaction Steps."

9 Do you see that?

10 A Yes, I do.

11 Q And those steps showed a proposed -- or show a proposed
12 dropdown transaction, as well as a proposed infusion of new
13 money by the Ad Hoc Group lending against the dropdown assets,
14 correct?

15 A It does.

16 Q Let's look at step four. It says:

17 "Company uses a portion of debt proceeds to purchase AHG
18 loans at a discount to par and then cancels loans under
19 Section 9.05(g)."

20 Do you see that?

21 A I do.

22 Q And "AHG" refers to the Ad Hoc Group of Apollo, Gamut,
23 and Angelo Gordon. Is that correct?

24 A Correct.

25 Q And the reference to "9.05(g)" is to the 2016 loan

1 agreement, correct?

2 A That's correct.

3 Q And so this proposal involved using 9.05(g) to purchase
4 loans at a discount to par from the Ad Hoc Group only. Is
5 that correct?

6 A That's correct.

7 Q And if we go to the next page of Exhibit 65, on the
8 left-hand side, under "Transaction Steps," we look at step
9 number three. It, again, mentions using Section 9.05(g) of
10 the 2016 credit agreement in the same way, correct?

11 A Yes, it looks like it.

12 Q Mr. Kwon, at this time, I'd like you to -- oh, let me
13 back up here.

14 MR. RUZINSKY: Your Honor, is Debtors' Exhibit 65
15 admitted?

16 THE COURT: You just offered it and it was admitted.

17 MR. RUZINSKY: And it is admitted. Yes, thank you.

18 THE COURT: We got that one.

19 MR. RUZINSKY: I will move on.

20 BY MR. RUZINSKY:

21 Q Mr. Kwon, Debtors' Exhibit 6, which is ECF 853-5, it's
22 also Tab 17. So this is going to be in the second notebook,
23 Mr. Kwon, the big one that only has two documents in it.

24 (Pause in the proceedings.)

25 A Yes.

1 Q All right.

2 (Pause in the proceedings.)

3 Q And you would agree with me, would you not, that this
4 Exhibit 17 -- I'm sorry -- Exhibit 6, which is Tab 17 in your
5 notebook there, is the 2016 credit agreement for Serta
6 Simmons, --

7 A Yes.

8 Q -- correct?

9 A That's correct.

10 MR. RUZINSKY: Okay. Your Honor, if this is not
11 already admitted, then I would move to admit it.

12 THE COURT: Mr. Ehrlich?

13 MR. EHRLICH: No objection, Your Honor.

14 THE COURT: All right. Thank you.

15 Let me just check.

16 (Participants confer)

17 THE COURT: It's admitted.

18 MR. RUZINSKY: Thank you, Judge.

19 THE COURT: Thank you, Mr. Ruzinsky.

20 (Exhibit 6, ECF 853-5, received in evidence.)

21 BY MR. RUZINSKY:

22 Q And Mr. Kwon, you know that this agreement applied to the
23 Serta Simmons 1-L debt and the entities that purchased that
24 debt, right?

25 A Yes, I do.

1 Q And you understand that this credit agreement, this 2016
2 credit agreement, protects certain sacred rights?

3 A Correct.

4 Q And sacred rights are rights within an agreement that
5 can't be changed without a hundred percent vote to change it,
6 right?

7 A Right.

8 Q Now one of the sacred rights in the 2016 credit agreement
9 prohibits altering the pro rata sharing of payments among
10 lenders in the same class, correct?

11 A Correct.

12 Q But there's an exception to that prohibition, correct?

13 A Yes.

14 Q And it's -- let's take a look.

15 (Pause in the proceedings.)

16 Q I'd like you to turn to, in Exhibit 6, it is Document
17 page 76. The ECF footers at the top say "page 81 of 475."

18 A I see it.

19 Q All right. And down at the -- this -- on this page, it
20 starts Section 2.18. Do you see it?

21 A I'm sorry. 2.1-what?

22 Q 2.18.

23 A 18, yes.

24 Q Okay. And at the very bottom of that page is subsection
25 (c). Do you see that?

1 A Yes, I do.

2 Q And even before we start talking about subsection (c),
3 the title of subsection 2.1 -- of Section 2.18 reads:

4 "Payments Generally, Allocation of Proceeds, Sharing of
5 Payments."

6 Do you see that?

7 A I do.

8 Q Okay. So let's go down to subsection (c) as in Charlie,
9 and it starts off by saying "if any lender obtains payment,"
10 right?

11 A Yes.

12 Q "-- whether voluntary or involuntary, through the
13 exercise of a right of setoff or otherwise, in respect of any
14 principal of or interest on any of the loans of any class held
15 by it, resulting in such lender receiving payment of a greater
16 proportion of the aggregate amount of its loans of such class
17 and accrued interest therein than the proportion received by
18 any other lender with loans of such class, then the lender
19 receiving such greater proportion shall purchase" --

20 And then it has more after that. Do you see that?

21 A I do.

22 Q All right. And so this is covering pro rata treatment of
23 lenders under this agreement, correct?

24 A Yes.

25 Q All right. And if you'll turn the page, please, the very

1 first line of the next page -- page 77 is a document number
2 and page 82 of 475 on the ECF numbering -- in the top line
3 there is a "provided that." And then there is a -- you know,
4 a good part of a paragraph after that.

5 Do you see it?

6 A Yes.

7 Q Okay. So "provided that."

8 And then go to Subsection (ii). It says "the provisions
9 of this paragraph," which we've now talked about the pro rata
10 sharing, "shall not apply to" -- and then there's an (a) and a
11 (b). Do you see that?

12 A I do.

13 Q And under (b), it says:

14 "Any payment obtained by any lender as consideration for
15 the assignment of or sale of a participation in any of its
16 loans to any permitted assignee or participant, including any
17 payment made or deemed made in connection with Sections 2.22,
18 2.23, 9.02(c), and/or Section 9.05."

19 Do you see that?

20 A Correct.

21 Q So, in this Section 2.18(c), the pro rata requirements
22 contain multiple exceptions, one of which is as provided in
23 Section 9.05. Do you see that?

24 A Yes.

25 MR. EHRLICH: Your Honor, objection, to the extent

1 that the witness is being asked to give a legal conclusion.
2 He is a -- he is a lay witness. I'm not -- I don't think
3 that's -- this is an appropriate question.

4 THE COURT: No. He is a sophisticated party that
5 deals with these agreements all the time. I feel very
6 confident, given what I've heard thus far, that, if he doesn't
7 know, he will say he doesn't know.

8 MR. EHRLICH: Thank you, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. RUZINSKY: Thank you, Judge.

11 BY MR. RUZINSKY:

12 Q Now let's go to Section 9.05. 9.05 is --

13 (Pause in the proceedings.)

14 (Participants confer)

15 BY MR. RUZINSKY:

16 Q Okay. 9.05, and I want to take us to (g).

17 (Pause in the proceedings.)

18 Q And so, Mr. Kwon, 9.05(g) says:

19 "Notwithstanding anything to the contrary contained
20 herein, any lender may, at any time, assign all or a portion
21 of its rights and obligations under this agreement in respect
22 of its term loans to any affiliated lender on a non pro rata
23 basis:

24 "(a) Through Dutch auctions open to all lenders holding
25 the relevant term loans on a pro rata basis; or,

1 "(b) Through open-market purchases in each case with
2 respect to Clauses (a) and (b), without the consent of the
3 administrative agent."

4 And then there are some "provided that" sections that are
5 afterwards. Do you see that?

6 A Yes, I do.

7 Q This subsection allows for a lender to assign their
8 rights and obligations on a non pro rata basis in two
9 circumstances, right?

10 A Yes, it does.

11 Q One, through the Dutch auction open to all lenders
12 holding the relevant term loans on a pro rata basis; and then,
13 second, through an open market -- in open-market purchases,
14 right?

15 A Yes.

16 Q Now PJT's proposal was that Serta uses proceeds from a
17 transaction to purchase the Ad Hoc Group's debt at a discount
18 and then cancels the loans under Section 9.05(g), correct?

19 A This is the prior?

20 Q Yeah, yeah.

21 A It looks that way, yes.

22 Q Okay. Now that wasn't going to be a Dutch auction open
23 to all, that PJT proposal, was it?

24 A I don't recall.

25 Q Well, let's go back and take a look.

1 And even before we do that, do you have any recollection
2 of any proposal that was from PJT Partners or communicated
3 through PJT Partners that in -- to Serta Simmons that involved
4 a Dutch auction?

5 A I don't recall.

6 Q Okay. So let's go back to --

7 (Pause in the proceedings.)

8 (Participants confer)

9 BY MR. RUZINSKY:

10 Q Let's go back to Exhibit 65, Debtors' Exhibit 65, sir.

11 A Which tab?

12 Q It is Tab 6.

13 A Thank you.

14 Q You're welcome.

15 And pages 6 and 7 of 15. On page 6 of 15, it is Step 4
16 under "Transaction Steps," and on page 7 of 15, it is Step 3.

17 Do you see that?

18 A Yes.

19 Q Okay. And so do you see where the PJT proposal
20 transaction step involves using 9.05(g) this way?

21 A I do.

22 (Pause in the proceedings.)

23 Q And nowhere in here is there any mention of any Dutch
24 auction, right?

25 A No, not that I can see.

1 I also don't see a mention of -- of market purchase,
2 either.

3 Q Now you had -- we have admitted the term sheets that got
4 exchanged between the parties, right?

5 A Correct.

6 Q And do you recall anything in any of those term sheets
7 about a Dutch auction?

8 A No.

9 I also don't recall any --

10 Q That's my only question. Do you --

11 A No.

12 Q -- recall about a Dutch --

13 A No.

14 Q -- auction?

15 And do you recall anything in any of those proposals from
16 the Ad Hoc Group or back from Serta that involve any type of
17 auction?

18 A Not that I can -- not that I can recall.

19 Q In fact, at no point did the Ad Hoc Group propose any
20 auction or Dutch auction to Serta Simmons, correct?

21 A Not that I can recall.

22 Q So the only other way, under 9.05(g), to -- or the only
23 way to accomplish the goal of 9.05(g), other than a Dutch
24 auction as described in that provision, was the open-market
25 purchase, correct?

1 A Wait. I'm sorry. Is the question this -- the proposal
2 that PJT has sent on March 31, how that ties to the ultimate
3 termsheets that were sent to the company?

4 Q No, I'm just taking you back to the parts of the credit
5 agreement that we went through that showed ways of
6 implementing Section 9.05(g) in two ways, two ways: One
7 through the Dutch auction, one through open-market purchase,
8 right?

9 A Correct.

10 Q So if 9.05(g) was going to be used for any purpose, and
11 it was not going to involve the Dutch auction, it had to be
12 used in connection with an Open Market Purchase, correct?

13 A Correct.

14 Q Let's also go in Exhibit 6 to Section 9.02(b) (A) (6).

15 A This is the credit agreement?

16 Q Yes, it is the credit agreement. And it should be
17 Exhibit -- page 143 of 475.

18 Actually, we're going to start on the page before that,
19 so it's page 142 of 475.

20 A Okay.

21 Q And so this is Section 9.02 entitled, "Waivers and
22 Amendments."

23 Do you see that?

24 A Okay. Which -- 9.02, yeah.

25 Q Okay. And when we flip the page to page 142 of 475,

1 subsection (b), small b then capital A, (A) starts, "The
2 consent of each lender directly and adversely affected
3 thereby, but not the consent of the required lenders, shall be
4 required for any waiver, amendment or modification that," and
5 then are 6 things listed under that.

6 Do you see that?

7 A I do.

8 Q Okay. So this is saying that, this beginning part is
9 that 100 percent lenders shall be required for certain things.
10 Right?

11 A Okay. Which specific section are you referring?

12 Q I'm on subsection capital (A).

13 A Yeah.

14 Q All right. We haven't gotten to the numbers yet. See
15 that?

16 A Yes.

17 Q Okay. And then if we go to Number 6, "Waives, amends or
18 modifies the provisions of Sections 2.18(b) or (c) of this
19 agreement in a manner that would by its terms alter the pro
20 rata sharing of payments required thereby."

21 And then it says, "Except in connection with any
22 transaction permitted under Sections 2.22, 2.23, 9.02(c)
23 and/or 9.05(g), or as otherwise provided in this Section 9.02.

24 Do you see that?

25 A I do.

1 Q So, and you understand the reference there to 9.05(g) to
2 being an exception from the general provision in capital (A)
3 there of requiring 100 percent of the lenders. Right?

4 A Can you give me a moment because you're --

5 Q Sure. Please.

6 A -- going through a lot of detail here.

7 Q I want you to look at 9.02 small (b) capital (A) and then
8 I want you to look at subsection 6.

9 A I got it. I just need time to read the words. (Perusing
10 document.)

11 Okay.

12 Q Okay. And 9.02(b)(A) is the sacred rights that you were
13 referring to earlier. Correct?

14 A Yes.

15 Q And Sacred Right Number 6 requires 100 percent lender
16 consent for a waiver, amendment or modification of the
17 provisions of 2.1 (a), (b) or (c) of the agreement in a manner
18 that would, by its terms, alter the pro rata sharing of
19 payments required with exceptions to that. Right?

20 A As I can see it, yes.

21 Q And one those exceptions is 9.05(g). Correct?

22 A Yes, it is.

23 Q And 9.05(g) is the section that provides for auctions and
24 Open Market Purchases. Right?

25 A Yes.

1 Q Now, Mr. Kwon, you would agree with me that the sacred
2 rights provision in this Section 9.02(b) (A) contains no anti-
3 subordination clause. Right?

4 A I'm not a legal expert, but I don't see one as I see it
5 right now.

6 Q And there's no sacred rights provision here that bars
7 indemnification of lenders who engage in open market exchanges
8 with the company. Right?

9 A Could you repeat that?

10 Q Sure. There's nothing in these sacred rights in this
11 2016 creditor agreement that prevents indemnification of
12 lenders who engage in open market exchanges with the company,
13 Serta Simmons.

14 A I haven't read, or re-read this with that specific
15 question in mind, and again, I'm not a legal expert, but I
16 don't see it in this section, 9.02(b) (A).

17 Q Which is the sacred rights section. Right?

18 A (No audible response.)

19 Q And there's no sacred rights provision barring
20 confidential negotiations between lenders and the company.
21 Right?

22 A Not that I can see.

23 Q And there's nothing stating that majority of lenders must
24 be allowed to participate in open market exchange
25 transactions, is there?

1 A Could you repeat the --

2 Q Sure. There's nothing in the sacred rights or otherwise
3 that says that a majority of lenders must be allowed to
4 participate in open market exchange transactions.

5 A I don't see that.

6 Q And you understand that Open Market Purchase provisions
7 are common in credit agreements. Right?

8 A I don't know.

9 (Pause in the proceedings.)

10 BY MR. RUZINSKY:

11 Q Have you ever testified differently, sir?

12 A That Open Market Purchase exceptions are common in the
13 market?

14 Q Uh-huh.

15 A I don't recall.

16 Q Let's go to your deposition testimony.

17 MR. RUZINSKY: And if you could please pull page 93.
18 And this will be lines 6 through 13.

19 BY MR. RUZINSKY:

20 Q Mr. Kwon, it's on the screen there. I ask you a question
21 at line 6, page 93 of your deposition, "Open market purchase
22 provisions are common in credit agreements, aren't they?"

23 And then after Mr. Ehrlich objected to form and said you
24 could answer your response was, "To my understanding, yes."

25 And that was your testimony at your deposition. Correct?

1 A That's correct.

2 Q You would agree with me that this particular credit
3 agreement, the 2016 credit agreement does not define the term
4 Open Market Purchase. Right?

5 A That's correct.

6 Q And you'd also agree with me that the parties to this
7 credit agreement could have provided for a definition of Open
8 Market Purchase. Right?

9 A Of course.

10 Q Especially if they wanted to deviate from the terms'
11 ordinary or unambiguous meaning. Right?

12 A Yes.

13 Q So at this time, Mr. Kwon, I want to take a look and do a
14 little comparison of some of the -- actually the final
15 proposal from the Ad Hoc Group to the offer that Serta Simmons
16 accepted from the PTL Lenders.

17 Would you agree with me that both involved private and
18 not public negotiations?

19 A Correct.

20 Q And that both involved a limited set of lenders?

21 A Could I put away the --

22 Q Yes, you can.

23 A Sorry, can you repeat the question?

24 Q Sure. And that both of those offers, the last offer from
25 the Ad Hoc Group and the offer that Serta Simmons accepted

1 from the PTL Lenders, both of those involved a limited set of
2 lenders. Right?

3 A What's your definition of limited?

4 Q Not open to all. So the Ad Hoc Group was just three
5 lenders. Right? Apollo, Gamut, and Angelo Gordon. Right?
6 And the PTL Lender Group did not include all of the 1-L
7 lenders. Right?

8 A Right.

9 Q So you would agree with me that both offers involved a
10 limited set of lenders. Right?

11 A Right.

12 Q Both involved about \$200 million in new money. Right?

13 A Eventually, yes.

14 Q And both involved exchanging 1-L and 2-L debt for new
15 debt. Right?

16 A Yes.

17 Q Both involved exchanging that existing debt below par to
18 give the company a discount. Right?

19 A Right.

20 Q Both exchanges proposed -- were proposed at rates above
21 the secondary trading prices. Right?

22 A Correct, as I recall.

23 Q Both involved discount rates that were negotiated rather
24 than paid to the secondary trading prices. Right?

25 A Can you repeat that one?

1 Q Both involved discount rates that were negotiated rather
2 than paid to the secondary trading prices.

3 A Correct.

4 Q Both involved the issuance of new structurally senior
5 debt. Right?

6 A What do you mean by "structurally senior"?

7 Q Had a senior right to the collateral or anything else.

8 A But the term structurally, that's an important point,
9 what do you mean by structurally?

10 Q What does that mean to you?

11 A So structurally senior in my experience means when you
12 are senior, but parts of different collateral. When you are
13 just talking about 1 pool of collateral, the word structurally
14 senior is irrelevant because it's one pool of collateral. If
15 you're talking about structurally senior, there's collateral
16 in different aspects. So again, unrestricted subsidiaries,
17 foreign JVs, collateral could be in different places.

18 When we mention structurally senior and the market
19 does, it means that the debt across the spectrum of a company,
20 when you pool that all together for these other entities, that
21 debt is structurally senior to the other collateral.

22 Here if we're talking about one pool of collateral, then
23 it's just senior or junior, that's it.

24 Q So just looking at the last Ad Hoc Group proposal and the
25 PTL proposal that was accepted by Serta Simmons, and those are

1 compared, are you telling me that they both did not involve
2 the issuance of new structurally senior debt?

3 A If you use the common market term of structurally senior,
4 our proposal would have been structurally -- that the debt at
5 the new entities created with new collateral would have been
6 structurally senior to the remaining debt and remaining
7 collateral. The favored lender's structure did not move any
8 collateral, so it's just senior and junior. There is no --
9 the term structurally senior is irrelevant.

10 Q So your answer to my question would be no then. Right?

11 A You want to repeat the question?

12 A Yeah, did both proposals involve the issuance of new
13 structurally senior debt?

14 A No.

15 Q Do both of the transactions, or both of the proposals
16 envision priming senior debt?

17 A Envision priming -- on what collateral group?

18 Q On any collateral.

19 A On the new collateral?

20 Q On any collateral.

21 A I'll explain if you don't mind. On new collateral
22 there's nothing primed because it's collateral that's
23 transferred so the debt raises new debt so --

24 Q My question to you though, sir, is -- and I'm going to
25 hold that question for just a moment.

1 (Pause in the proceedings.)

2 BY MR. RUZINSKY:

3 Q So is it your testimony that the last Ad Hoc Group
4 proposal did not involve structurally senior debt?

5 A No, our -- the Ad Hoc Group's last preliminary proposal
6 did include structurally senior debt. The other proposal that
7 was taken did not include structurally senior debt, it was
8 just senior debt.

9 THE COURT: So, Mr. Kwon, just to try to keep this
10 from extending on forever, at the end -- assuming that both
11 transactions had occurred, in each the participating lenders
12 ended up with debt that was senior to the non-participating
13 lenders. Is that a fair statement?

14 THE WITNESS: That's not quite accurate, Judge.

15 THE COURT: Okay. Then please explain.

16 THE WITNESS: In our proposal -- so status quo,
17 status quo is you have a 1st lien, 2nd lien at the company
18 with liens on most of the debt. Our proposal, which again was
19 million mark, it moved collateral to new entities that were
20 created. And the debt would have been raised on those new
21 entities only tied to that collateral that was moved. Only
22 tied to the collateral. So --

23 THE COURT: I understand that. And so you're
24 actually telling me that by moving the collateral to the new
25 entity, the non-participating lenders would have lost any

1 claim to that collateral. Is that correct?

2 THE WITNESS: Yes, they would have been a junior,
3 not lost all of it but they would have been a junior.

4 THE COURT: So they would have had a subordinated
5 lien position.

6 THE WITNESS: On the moved collateral, correct.

7 THE COURT: Right. So the participating lenders
8 would have had senior debt as to the non-participating
9 lenders. Correct?

10 THE WITNESS: On just the moved collateral.

11 THE COURT: I get that you want to -- I get that you
12 want to limit it, I don't have to suffer that like
13 Mr. Ruzinsky does. Just answer the question.

14 THE WITNESS: Yeah.

15 THE COURT: Okay. Go ahead.

16 MR. RUZINSKY: Thank you, Judge.

17 BY MR. RUZINSKY:

18 Q Mr. Kwon, both proposals relied upon Section 9.05(g). Is
19 that correct?

20 A I'm not sure. Our proposal as you showed, the March 31
21 idea from PJT, I'm not sure if that translated -- that exactly
22 kind of translated into the proposal that we offered
23 (indiscernible).

24 Q You just don't know.

25 A No.

1 Q Let's go to Exhibit 202, it is ECF 864-45.

2 A Which tab?

3

4 Q This is Tab 10.

5 A Thank you.

6 Q You're welcome.

7 I'd like to focus on the slide deck and I want to go to
8 Slide 7.

9 (Pause in the proceedings.)

10 BY MR. RUZINSKY:

11 Q Mr. Kwon, have you seen this before?

12 A Yes, the first time was during my deposition.

13 Q And we spent some time at your deposition going through
14 the chart on this particular page. Right? Page 12 of 34?

15 A Correct.

16 Q Okay. And so I want to talk a little bit in terms of
17 comparison here. First, the line for amount under new money
18 has got AG bid and AG is Angelo Gordon. Right?

19 A I would presume so, yes.

20 Q Okay. And that would -- and you would recognize this bid
21 from May 30, wouldn't you?

22 A Yeah, it's -- yes.

23 Q Okay. So this is really the Ad Hoc Group proposal.
24 Right?

25 A Yes.

1 Q All right. And then the 2nd -- or actually I think it's
2 the next column to the right is the GD bid and that would be
3 the Gibson Dunn Group, the PTL Lender Group. Right?

4 A Yes.

5 Q Okay. Now under amount it's got 200 million for the
6 Ad Hoc Group and it's got 125 million for the PTL Group. But
7 there's also a footnote down at the bottom you'll see that it
8 says, "Assumes the company only borrows 125 million of new
9 money and expands subsequent exchange capacity by 75 million."

10 Do you see that?

11 A I don't see the footnote, where is it?

12 Q So if you go -- go down to the notes section, it is
13 right -- it's the 2nd line of the note section.

14 A As a simplifying assumptions illustratively assumes
15 company only borrows that. Is that the one?

16 Q Yeah, that's it. You see that?

17 A Okay. Yes.

18 Q Okay. And I think you had testified earlier that you
19 understand that the final deal with the PTL Lenders involved
20 \$200 million --

21 A Yes.

22 Q -- of new money. Right? Okay. So the new money terms
23 were the same, \$200 million each. Let's look at the cost of
24 capital as a comparison.

25 Would you agree with me that the accepted proposal, the

1 PTL Lenders' proposal, had a lower cost of capital than the
2 proposal submitted by the Ad Hoc Group?

3 A Wait, so I'm sorry, so this bid -- because this is new --
4 this bid on June 4 I'm not -- does this reflect the final
5 terms? You asked me to assess the final terms versus our last
6 proposal.

7 Q Yeah, well, let's -- I believe so except for the 200
8 million, but let's do the comparison here, the comparison of
9 the Gibson Dunn bid on that column and we're comparing what's
10 on this page, cost of capital, and would you agree with me
11 that the accepted proposal had a lower cost of capital than
12 the proposal submitted by the Ad Hoc Group?

13 A I'm sorry, before that, though, can we go back to the 125
14 you mentioned, because you jumped and said the final deal had
15 200 million of new money. I don't understand this footnote,
16 so I don't understand the proposal that was offered. The 125
17 new money from Gibson Dunn and expands subsequent exchange
18 capacity by 75. I'm not sure that it equates to \$200 million
19 of new money.

20 Q Okay. Well, let's set that aside for the moment. You've
21 already testified that you understand the final deal was \$200
22 million.

23 A Correct.

24 Q You knew because you had done the comparison and gotten
25 all riled up about the fact that the company took a -- you

1 know, accepted a different proposal. You know the terms of
2 the accepted proposal. Right?

3 A Yes. What do you mean -- when did I get riled up?

4 (Laughter.)

5 BY MR. RUZINSKY:

6 Q You filed a lawsuit. Right?

7 A I did not file any lawsuit, our group did.

8 (Laughter.)

9 THE COURT: Mr. Ehrlich?

10 MR. EHRLICH: Yeah, I just would note my objection
11 that there's no foundation for this witness with this
12 document. He didn't prepare it, he's not on it and it -- you
13 know, he's being asked to interpret words on a page.

14 THE COURT: Mr. Ruzinsky?

15 MR. RUZINSKY: I accept that and I'm not going to
16 ask him to interpret the words that he said he didn't
17 understand.

18 THE COURT: All right. Then sustained.

19 BY MR. RUZINSKY:

20 Q The final deal, the final deal proposal --

21 A Yes.

22 Q -- okay, who had a lower cost of capital?

23 A I don't recall, I'd have to do a comparison. I don't
24 recall. And we also have to bifurcate between cash, cost of
25 debt versus overall cost.

1 Q Well, let's go to your proposal, the Ad Hoc Group's
2 proposal, it was LIBOR plus 550. Right?

3 A Yes.

4 Q Okay. And you also had a PIK rate of 4.5 percent.
5 Right?

6 A Correct, non-cash.

7 Q All right. And you had -- so you put that together and
8 you've got LIBOR plus how much?

9 A You're asking me to add it up?

10 Q Okay.

11 A Yeah, well, LIBOR plus 1,000.

12 Q Plus 10 percent.

13 A 5 percent.

14 Q Okay. All right. The deal that the company accepted was
15 how much?

16 A LIBOR 750.

17 Q Okay. And so just focusing on that term, the lower
18 interest rate is better for Serta, higher interest rate was
19 worse for Serta. Right?

20 A Not necessarily. Cash is very important, especially
21 during this period where the company is having liquidity
22 shortfall. So cash interest is I would say if not equally
23 probably more important.

24 Q So you think -- you think a combined -- your testimony is
25 a combined interest rate of cash and PIK interest that is

1 higher is beneficial, is more beneficial to the borrower than
2 a lower interest rate that ha no PIK interest component?

3 A For a company that is in distress facing a short-term
4 liquidity -- well, a liquidity crisis, cash interest is --
5 probably should be more important than overall interest.

6 Q But the lower cost of capital is the combined lower
7 interest rate. Correct?

8 A The total cost of capital?

9 Q Uh-huh.

10 A Yes, cost of capital includes both cash and PIK, but in
11 reality cash is what's being paid.

12 Q Which proposal offered greater debt relief?

13 A The other proposal.

14 Q And for a company that was in trouble, debt relief was
15 pretty important to it. Right?

16 A (No audible response.)

17 Q Isn't that your understanding? Didn't you know from the
18 negotiations that debt relief was very -- a very significant
19 consideration for Serta?

20 A It was important becuase the company wanted to be
21 opportunistic and extract the discount scene in the market at
22 the time.

23 Q And that was important to Serta. Right?

24 A Yes.

25 Q And the amount, the difference in the amount of the debt

1 relief was over \$100 million. Right?

2 A I believe so.

3 Q So under the last proposal from the Ad Hoc Group Serta
4 Simmons would have been left with more debt than it started
5 with. Right?

6 A Are you taking into account the new money that was
7 invested.

8 Q Taking into account everything. There was new money,
9 there was some debt relief, and it was -- at the end of the
10 day Serta Simmons had more debt than it started with. Right?

11 A It looks like a touch more, 30 million more, if this is
12 an accurate representation of our deal and the other deal.

13 Q So I'm just asking you about the PTL Lender Group offer,
14 the last offer at the time. So --

15 A PTL or non-PTL?

16 Q I'm sorry, the Ad Hoc Group, the Ad Hoc Group non-PTL,
17 said it was \$38 million more debt at the end of the day when
18 you factor in new money and debt relief. Right?

19 A Correct, \$30 million -- \$38 million more in debt.

20 Q Right. And then if you look at the last -- if you took
21 the accepted proposal, the accepted proposal gave well over
22 \$100 million of total debt relief to Serta Simmons as one of
23 the consequences of accepting that transaction. Correct?

24 A Correct.

25 Q Let's go to Exhibit, Debtor's Exhibit 261, it's ECF

1 889-2, and it's Tab 11 in your notebook, sir.

2 A Thank you.

3 Q All right. This is an Apollo document entitled, "Serta
4 Simmons Update July 2020." Is that right?

5 A Yes, it looks like it was a draft.

6 Q Okay. And then I want to take you to the second page of
7 that slide deck which is page 2 of 47.

8 And, Mr. Kwon, this document was prepared by Apollo.
9 Right? It says it's an Apollo document. Right?

10 A Yes.

11 Q And you participated in -- did you participate in any of
12 the preparation of this document?

13 A Yes.

14 Q And do you remember any aspect of this document?

15 A There were a lot of documents at the time, but, yes, some
16 of this is familiar.

17 Q Okay.

18 MR. RUZINSKY: Your Honor, I'm going to move to
19 admit Exhibit 261, Debtor's Exhibit 261.

20 MR. EHRLICH: No objection.

21 THE COURT: Thank you, sir.

22 It's admitted.

23 MR. RUZINSKY: Thank you, Judge.

24 (Exhibit 261, ECF 889-2, received in evidence.)

25 BY MR. RUZINSKY:

1 Q Mr. Kwon, let's got to the second page. And it's
2 entitled, "Serta Simmons Update."

3 Do you see that?

4 A I do.

5 Q And there is a, you know, there's a blacked out or marked
6 out part in the middle, a big square there that says, TBU.

7 Do you see that?

8 A Yes.

9 Q And does that mean "to be updated"?

10 A Correct.

11 Q All right. Now this line talks about the PTL Lenders'
12 proposal. Right?

13 A It looks like it, reading through that big TBU block, yes.

14 Q Uh-huh. And it also mentions -- right below the big TBU
15 block there it says, "Fund IX's position would be subordinated
16 by the new \$1,075 million super senior debt."

17 Do you see that?

18 A Yes.

19 Q And Fund IX was an Apollo fund. Right?

20 A Correct.

21 Q All right. And it appears to mention -- you can see 875,
22 would that be \$875 million exchange?

23 A Most likely but, yeah, you've got to read through the big
24 to be updated block.

25 Q Okay. And it says, "Transaction support agreement is in

1 place with 51 percent of creditors, but definitive documents
2 have not yet been finalized."

3 Do you see that?

4 A I see it.

5 Q And that's -- you know that the PTL Lender Group had
6 51 percent of the 1-L tranche participation for that. Right?

7 A That was our understanding, yes.

8 Q So this was made some time after Apollo had learned of the
9 accepted PTL proposal, but before it had closed. Right?

10 A Correct.

11 Q Now there's been some suggestion that the PTL transaction
12 at issue, that has been referred to sometimes as an uptiering
13 transaction, was unforeseeable.

14 Do you recall that testimony?

15 A Yes.

16 Q And would you agree with me that this document says, in
17 the last bullet point above the blackout at the bottom it says,
18 "This specific risk of amending the waterfall with a majority
19 was extensively diligenced with Paul Weiss during the original
20 distressed debt underwriting and during this current
21 transaction process."

22 Do you see that?

23 A Yes.

24 Q And that's referencing the PTL Lender transaction. Right?

25 A Sure.

1 (Pause in the proceedings.)

2 BY MR. RUZINSKY:

3 Q Mr. Kwon, would you agree with me that confidentiality
4 agreements are standard in the industry for these type of
5 transactions?

6 A Yes.

7 Q And when Apollo was negotiating the Ad Hoc Group proposed
8 transaction, it did not inform other lenders outside that
9 Ad Hoc Group of the proposal. Right?

10 A Correct.

11 Q And you'd also agree with me that indemnification
12 provisions for the benefit of lenders in credit agreements are
13 standard in the industry. Right?

14 A It's my understanding, yes.

15 Q Can you give us one example where Apollo bought debt under
16 a credit agreement that did not contain an indemnity provision?
17 Excuse me?

18 A I just was drinking water.

19 Q Okay. And so the answer to the question is?

20 A Can you repeat the question?

21 Q The question is: Can you give us one example where Apollo
22 bought debt under a credit agreement that did not contain an
23 indemnity provision for the benefit of the lender?

24 A I cannot, but I'm not the best source of, you know, all
25 the indemnity provisions that Apollo has taken on though

1 confidentiality agreements.

2 MR. RUZINSKY: Your Honor, I'm going to object and
3 move to strike after --

4 THE COURT: Granted.

5 MR. RUZINSKY: -- the words, "I cannot."

6 BY MR. RUZINSKY:

7 Q Mr. Kwon --

8 FEMALE SPEAKER: I'm sorry, I didn't catch the
9 judgment.

10 THE COURT: I can't hear her.

11 MR. RUZINSKY: Excuse me?

12 THE COURT: I can't hear her.

13 FEMALE SPEAKER: What did he say (indiscernible)?

14 FEMALE SPEAKER: Granted.

15 MR. RUZINSKY: Yeah, I thought you granted the
16 objection.

17 THE COURT: I granted the request to strike.

18 MR. RUZINSKY: Yeah.

19 THE COURT: It wasn't an objection.

20 MR. RUZINSKY: Yeah. Thank you, Judge.

21 BY MR. RUZINSKY:

22 Q Mr. Kwon, would you agree that it is common for lenders
23 making changes by majority vote in a credit agreement that a
24 borrower has already signed? That amendments to credit
25 agreements that a borrower has already signed, that's common.

1 Right?

2 A Sir, can you repeat it one more time?

3 Q Sure. Would you agree with me that it's common for
4 lenders to make changes by majority vote in a credit agreement
5 that a borrower has already signed.

6 A Yes, it's common.

7 Q And Apollo has participated in restructuring transactions
8 that involve amended credit agreements. Right?

9 A I believe so.

10 Q And when Apollo signs credit agreements that permit
11 amendment by majority vote, Apollo understands the agreement is
12 subject to amendment or change. Right?

13 A I believe so.

14 Q And you understand that the 2016 credit agreement in this
15 case also permits amendment by majority vote. Right?

16 A Yes, I believe so.

17 Q And Apollo does not dispute that the amendments made to
18 this credit agreement received majority support. Right?

19 A That's correct.

20 Q You would agree with me that Apollo has used its
21 relationships, prior dealings or potential for future deals
22 with other lenders or borrowers to participate in transactions
23 involving corporate debt or syndicated loans.

24 A You're going to have to repeat that, please.

25 Q Sure. Would you agree with me that Apollo has used its

1 relationships, prior dealings or potential for future deals
2 with other lenders or borrowers to participate in transactions
3 involving corporate debt or syndicated loans?

4 A I believe so.

5 Q And you would agree with me that Apollo acted in good
6 faith when it did so.

7 A I believe so.

8 Q And that's also consistent with industry norms and ethics.
9 Right?

10 A I believe so.

11 Q Would you agree with me that Apollo has received benefits
12 in a debt exchange or re-purchase transaction that were not
13 given to Excluded Lenders?

14 A Can you repeat the question, please?

15 Q Would you agree with me that Apollo has received benefits
16 in a debt exchange or re-purchase transaction that were not
17 given to Excluded Lenders?

18 A I believe so.

19 Q And when Apollo did so it acted in good faith and
20 ethically. Right?

21 A I believe so.

22 Q And doing so would be consistent with business norms.
23 Right?

24 A I'm sorry what is the doing so?

25 Q And doing so would be receiving benefits in a debt

1 exchange or re-purchase transaction that was not given to
2 Excluded Lenders.

3 A It depends on the situation, but I believe so.

4 Q You would also agree with me, would you not, that your
5 fiduciary duty is to your investors and if you're not
6 protecting your position, you're not going to like that.
7 Right?

8 A Yes.

9 Q You mentioned two transactions earlier in your Direct
10 testimony. One was called Envision and one was called Mytell
11 (phonetic). Do you remember that?

12 A (No audible response.)

13 Q With respect to Envision Apollo participated in an uptier
14 debt exchange transaction involving Envision Healthcare.
15 Correct?

16 A Correct.

17 Q And a majority of the creditors amended the parties'
18 existing agreements to permit the issuance of new senior
19 priming debt in that case. Right?

20 A As I understand, yes.

21 Q That amendment had been negotiated with holders of a
22 majority of Envision's first lien term loan facility. Right?

23 A As I -- I believe so.

24 Q And the participating lenders in that instance, including
25 Apollo, put in new money. Right?

1 A Yes.

2 Q About \$300 million. Right?

3 A Yes, but our portion of that was much smaller.

4 Q Now Apollo did not invite or insist on inviting all first
5 lien lenders to participate in that transaction, did they?

6 A I do not know.

7 Q So you have no knowledge that anyone from Apollo invited
8 or insisted on inviting any other lenders to participate. Is
9 that your testimony?

10 A My testimony is I -- we were merely a participant.

11 Q I understand you were a participant, but you could have
12 gone to any of the other lenders in that group and said, "I
13 want all the other lenders to be allowed the same opportunity."
14 You could have done that. Right?

15 A I'm not sure

16 Q You're not sure?

17 A I'm not sure.

18 Q Were you involved in the Envision transaction?

19 A I was not.

20 Q But you have a general knowledge of the terms of that
21 transaction. Right?

22 A General knowledge, yes.

23 Q Moving to Mytell, Apollo participated in a debt exchange
24 transaction with Mytell and got benefits that were not open to
25 all of the lenders in that group. Right?

1 A My understanding, yes.

2 Q I'd like you to go to the big binder of the two that I had
3 given you, sir, and --

4 MR. RUZINSKY: Which exhibit is the credit agreement?

5 UNIDENTIFIED SPEAKER: 361.

6 UNIDENTIFIED SPEAKER: 361.

7 MR. RUZINSKY: Okay. 361. Exhibit 361, sir, and it
8 would be in one of those two tabs.

9 THE WITNESS: Which tab?

10 MR. RUZINSKY: It would be --

11 THE WITNESS: Yeah, 2, Mytell.

12 MR. RUZINSKY: Of -- yes, Mytell.

13 BY MR. RUZINSKY:

14 Q So the very first page of Exhibit 361 says, "First lien
15 credit agreement dated as of November 30, 2018." Correct?

16 A Yes.

17 Q And you understand this to be the first lien credit
18 agreement in the Mytell transaction. Right?

19 A I do not. I don't know. I don't recognize MLN TopCo, MLN
20 UK HoldCo. I'm not familiar with this document.

21 Q Well, it was produced by your counsel.

22 (Pause in the proceedings.)

23 BY MR. RUZINSKY:

24 Q If it was produced by your counsel as the Mytell
25 pre-existing credit agreement, do you have any information that

1 would dispute that?

2 A No. I'm just stating I don't recognize this document at
3 all.

4 Q Okay.

5 MR. RUZINSKY: All right. I'm going to move to admit
6 the document.

7 THE COURT: Any objection?

8 MR. EHRLICH: Well, I don't think it's appropriate
9 through this witness, but, in fact, the parties had stipulated
10 to it this morning, that it's in evidence, so.

11 THE COURT: Oh, is this -- is the one of the
12 stipulated documents that I haven't --

13 MR. EHRLICH: I believe between --

14 THE COURT: -- it's on the list --

15 MR. EHRLICH: -- an exchange between my colleague,
16 Mr. O'Loughlin and Mr. Wilson, we had agreed.

17 UNIDENTIFIED SPEAKER: I don't think it's been
18 formally in to the Record yet.

19 MR. EHRLICH: What's that?

20 UNIDENTIFIED SPEAKER: It's not formally --

21 MR. EHRLICH: Okay.

22 UNIDENTIFIED SPEAKER: -- in the Record yet.

23 MR. EHRLICH: Then given that we've stated that we
24 would stipulate, I'm not going to object.

25 THE COURT: All right. Then it's admitted.

1 (Exhibit No. 361 received in evidence.)

2 MR. EHRLICH: Which it reserves any objection to its
3 use with witness --

4 THE COURT: Absolutely.

5 MR. EHRLICH: -- depending on how it --

6 THE COURT: If he asks him what something means --

7 MR. EHRLICH: -- is used.

8 THE COURT: -- and he can certainly have him read
9 sentences if that's what he wants to do, but I agree until he
10 lays a foundation that he has knowledge he can't ask him any
11 substantive questions.

12 MR. EHRLICH: Thank you, Your Honor.

13 MR. RUZINSKY: We're going to move off this exhibit
14 at the moment, Judge, and we're going to move to Exhibit --
15 it's Tab 14, Exhibit 362.

16 THE WITNESS: Which tab again?

17 MR. RUZINSKY: 14.

18 (Pause in the proceedings.)

19 BY MR. RUZINSKY:

20 Q Are you there, sir?

21 A I am.

22 Q Now you understand that Apollo's been sued for its role in
23 the Mytell transaction, don't you?

24 A Us and other lenders, that's what I understand.

25 Q Yes. And if you look at this Exhibit 362, on the third

1 page you can see about halfway down the caption, you can see
2 Apollo Global Management Limited, John Doe Funds issued,
3 sponsored or managed by Apollo Global Management Limited.

4 Do you see that?

5 A Yes, I do.

6 Q As Defendants. Do you see that?

7 A Yes, I do.

8 MR. RUZINSKY: Your Honor, I'm going to move for the
9 admission of this document, and I'm not asking that it be
10 admitted for the truth of the matters asserted in it.

11 THE COURT: What purpose are you offering it?

12 MR. RUZINSKY: The purpose of the offer is for when
13 it was filed, who it was filed against, and some of the
14 allegations that are contained in there that are just
15 allegations. The cause -- there are two causes of action here
16 that I want to establish. The claim has been made.

17 THE COURT: Okay.

18 MR. EHRLICH: Well, Your Honor, is this a document
19 that was filed on the Docket of the New York Supreme Court. I
20 think it's appropriate for the Court to take judicial notice of
21 it if the Court thinks that relevant. I don't think it should
22 be an exhibit in the Record of this proceeding.

23 MR. RUZINSKY: The reason why I would like -- if I
24 may respond, Your Honor?

25 THE COURT: Certainly.

1 MR. RUZINSKY: The reason why I would like to admit
2 this is that I think the Court will see that the type of claims
3 that are being asserted against our clients have been asserted
4 against them in connection with a transaction that we
5 contend --

6 THE COURT: All right. So why don't we do it this
7 way, because the way you're going about it causes me all kinds
8 of heartburn from my years of having evidence fights.

9 MR. RUZINSKY: Okay.

10 THE COURT: So why don't you ask him if Apollo's been
11 sued on a particular claim when he says, "I can't remember,"
12 then you can use the document to refresh his recollection.
13 Because he's already said Apollo got sued.

14 THE WITNESS: Yes.

15 THE COURT: Why don't we do it that way?

16 MR. RUZINSKY: I will do it that way, Judge.

17 THE COURT: All right.

18 MR. RUZINSKY: Thank you.

19 BY MR. RUZINSKY:

20 Q Mr. Kwon, as part of that lawsuit that Apollo and others
21 have been sued on in connection with the Mytell transaction,
22 isn't it true that among the claims asserted against Apollo and
23 the other Defendants is that they breached the loan agreement?

24 A I'm not sure.

25 Q Okay. Would you please turn in Exhibit 362 to page 52,

1 counting pages at the bottom.

2 A Okay.

3 Q All right. And do you see there it says, "The fourth
4 cause of action, breach of contract, all Plaintiffs against all
5 Defendant lenders."

6 Do you see that?

7 A Yes.

8 Q And you know from the caption on page 3 that Apollo is
9 listed as one of the Defendant lenders. Right?

10 A Yes.

11 Q And in numbered paragraph 161 there's a reference to the
12 original agreements. Do you see that?

13 A 161?

14 Q Numbered paragraph 161.

15 A Yes.

16 Q Also in numbered Paragraph 159, it talks about the
17 original agreements.

18 THE COURT: Mr. Kwon, in looking at this page does
19 this refresh your memory that your company, Apollo, was sued
20 for breach of contact in that lawsuit?

21 THE WITNESS: It does.

22 THE COURT: All right.

23 MR. RUZINSKY: Thank you, Judge.

24 BY MR. RUZINSKY:

25 Q Turn, please, to page 56, Mr. Kwon.

1 THE COURT: You've got to ask him the question first.

2 BY MR. RUZINSKY:

3 Q Mr. Kwon, the seventh cause of action that's listed -- or
4 do you recall that in the Mytell lawsuit that Apollo and other
5 lenders were sued for breach of an implied covenant of good
6 faith and fair dealing?

7 A I do not recall.

8 Q Okay. Please look at page 56.

9 A I see it.

10 Q Under seventh cause of action, you've seen that now, does
11 that refresh your recollection that, in fact, Apollo and the
12 other lender Defendants in this case were sued for breach of an
13 implied covenant of good faith and fair dealing?

14 A Yes.

15 Q And in Mytell the lenders there uptiered their existing
16 debt holdings into debt that was structurally senior through an
17 exchange. Right?

18 A That's my understanding except for the term structurally
19 senior, just senior. I don't believe collateral is moved in
20 this.

21 Q You would agree with me that Apollo received financial
22 benefits in the Mytell transaction and participated in that
23 Excluded Lenders did not receive.

24 A My understanding, yes.

25 Q And Apollo kept its negotiations in the Mytell transaction

1 from some of the non-participating lenders. Right?

2 A I do not recall, I do not know.

3 Q Have you ever testified differently, sir?

4 A I don't recall.

5 Q Let's go to your deposition and see. You want to go to
6 page 273 of your deposition, lines 6 through 9.

7 "Question: Did Apollo receive any financial benefits that
8 the Excluded Lenders did not receive?"

9 "Answer: To my knowledge, yes."

10 Do you see that?

11 A Yeah, I apologize, I thought I answered (indiscernible).

12 THE COURT: I think you --

13 MR. RUZINSKY: Oh, I'm sorry. Got the wrong ones.
14 We're going 14 through 17.

15 BY MR. RUZINSKY:

16 Q "Did Apollo keep its negotiations confidential from some
17 of the non-participating lenders" was the question, answer, "To
18 my knowledge, yes."

19 Do you see that?

20 A I do.

21 Q Okay. And then let's go back to page 272 and line 4,
22 you'll see that the reference there is we're talking about the
23 Mytell transaction.

24 So that was your testimony at your deposition on that
25 question in connection with the Mytell transaction. Correct?

1 A Correct.

2 Q And you don't recall Apollo ever trying to invite the
3 Excluded Lenders in Mytell into that transaction, do you?

4 A I do not, no.

5 Q In the Mytell transaction you believe that Apollo acted in
6 good faith and ethically with respect to all aspects of that
7 transaction. Right?

8 A Right.

9 Q Now it was June 5, 2020 when Apollo learned that its
10 proposal was not being accepted. Right?

11 A That seems about right.

12 Q And the Ad Hoc Group then began exploring ways to block
13 the PTL Lenders' deal. Right?

14 A On June 5, is that the question?

15 Q That they began, you know, they began thereabouts. Right?

16 A Thereabouts, I don't know the specific date, but
17 thereabouts.

18 Q And ultimately there was a lawsuit filed. Right?

19 A Right.

20 Q But before that lawsuit was filed the Ad Hoc Group tried
21 other ways to stop the PTL Lender transaction. Right?

22 A I believe so.

23 Q All right. Let's go to Exhibit 212, ECF 865-5, it's
24 Tab 15 in your notebook, sir.

25 A Thank you.

1 Q Now this is an email from David Sambur to a William Everts
2 (phonetic) and you are cc'd on this email from Saturday,
3 June 6, 2020. Correct?

4 A Correct.

5 Q And it also, you know, contains -- it contains a string of
6 email and you were either a direct recipient or cc'd on those
7 emails. Correct?

8 A Yeah, it looks like mostly cc'd.

9 Q Well, let's go, so let's go to page 2 of 6 in Exhibit 212.
10 You're one of the -- you're one of the parties that was -- or
11 one of the people it was sent to directly. You're not in the
12 cc list there, are you?

13 A I'm on the email, yes. I'm included in the email, CCR2.

14 Q Okay. And the same thing in the -- on page 3, it's to you
15 and others, you're not in the cc group there are you?

16 A Again, throughout this email chain I affirmatively confirm
17 that I am on the email chain, whether it's on the "To" line or
18 the "CC" line.

19 Q Okay. And you received these emails. Right?

20 A Correct.

21 Q Okay.

22 MR. RUZINSKY: Your Honor, I'd like to introduce, if
23 it is not already in evidence, Debtor's Exhibit 212.

24 MR. EHRLICH: No objections.

25 THE COURT: Any objection?

1 MR. EHRLICH: No objection.

2 THE COURT: Thank you. It's admitted.

3 (Exhibit No. 212 received in evidence.)

4 BY MR. RUZINSKY?

5 Q And, Mr. Kwon, this email string shows that very shortly
6 after the PTL Lenders' transaction was announced as being
7 accepted by Serta Simmons, the Ad Hoc Group discussed ways --
8 you know, discussed reaching out to the PTL Lenders. Right?

9 A It looks like that way, yes.

10 Q Okay. And Angelo -- I'm sorry, not Angelo Gordon, but the
11 Ad Hoc Group put together certain talking points in
12 anticipation of one or more calls with the PTL Lenders. Right?

13 A Yes.

14 Q All right. And let's take a look at some of those.

15 One of those talking points is Advent, that's Serta's
16 sponsor, played our two groups off each other and continues to
17 do so.

18 Do you see that?

19 A Where is that?

20 Q That is --

21 A Yes, I see it.

22 Q -- page 1.

23 A Yep.

24 Q It also says in the next line, "We can see the Gibson and
25 Centerview Group has outmaneuvered our group."

1 Do you see that?

2 A I do.

3 Q And it also expresses concern about a race to the bottom
4 and litigation risk. Right?

5 A Correct.

6 Q And it also proposed, on page 2, a lock up of the two
7 sides together. Is that right?

8 A It looks that way, yes.

9 Q So this is the Ad Hoc Group saying, "We'll sign a lock up
10 that ties us all together that Gibson can draft," and then it
11 says, "The group will only pursue transactions that treat all
12 parties the same and are supported by the group."

13 Do you see that?

14 A Correct.

15 Q And then you've got a feature here where you say, "Payment
16 to Gibson/Centerview Group option."

17 Do you see that?

18 A Yeah, I didn't say it, but, yes, it's drafted there.

19 Q And it has two alternatives there. It says, Ad Hoc Group
20 purchase of \$200 million of face value at 65 cents, or
21 \$30 million fee paid directly to Ad Hoc Group members. Right?

22 A Yes.

23 Q So one of the things being considered was paying
24 \$30 million to the PTL Lender Group to not do their
25 transaction. Is that right?

1 A Well, it looks like under this talking point, set of
2 talking points it was, yes, a fee to pay them to work together.

3 Q Was Serta Simmons going to get any part of that money?

4 A In this talking -- set of talking points? No.

5 Q And when you saw this, did you immediately reach out to
6 the folks who were on this email and say, "Stop, don't do
7 that"?

8 A I did not.

9 Q Do you know of anybody else in the PTL Lender Group -- I'm
10 sorry, in the Ad Hoc Group who expressed concern about a
11 \$30 million payment to the other group whose deal had just been
12 announced as being accepted?

13 A Well, sorry, this is June 6?

14 Q Uh-huh.

15 A I don't think the transaction was officially announced yet

16 Q You don't think the transaction had been announced on
17 June 6?

18 A Again, I'd have to recall the exact timing, but I don't
19 think it was announced.

20 Q When was the first time you were told of the PTL Lender
21 transaction?

22 A I think the day right before this, on Friday, June 5.

23 Q Okay. And so Friday, June 5 was when you learned of the
24 terms of the transaction that Serta Simmons was going with as
25 opposed to the Ad Hoc Group transaction. Right?

1 A At that point in time I don't think we knew about the
2 terms, all we knew that -- was that they were doing a
3 transaction with the Gibson Dunn Group.

4 Q Okay. So not knowing -- you're telling us not knowing the
5 terms of this transaction, you know, your Ad Hoc Group was
6 discussing making a \$30 million payment to the competition,
7 whose deal had just gotten accepted by Serta, to not do that
8 deal.

9 A That's how extreme the situation was that the company had
10 pit against us.

11 Q And you thought doing something extreme in response to
12 that was proper?

13 A What is -- what do you mean by extreme in our response?

14 Q Paying \$30 million to the competition to not do their
15 deal.

16 A These are pretty standard in the industry.

17 Q So you felt like it was good faith, it was fair and it was
18 ethical for there to be, from the Ad Hoc Group who had just
19 learned that their deal was not accepted, to make a \$30 million
20 payment to the group whose deal was being accepted to not do
21 that deal.

22 A I think, again, what these talking points drafted on
23 Saturday, June 6, they were offering the Gibson Dunn Group a
24 set of options, a set of alternatives.

25 MR. RUZINSKY: Move to strike as non-responsive.

1 THE COURT: Sustained. If you'd re-ask the question.

2 MR. RUZINSKY: Thank you, Judge.

3 BY MR. RUZINSKY?

4 Q Mr. Kwon, my question is that you believe it was good
5 faith, fair and ethical for the Ad Hoc Group, right after they
6 learned of the Serta Simmons acceptance of the PTL Lender
7 transaction, for the Ad Hoc Group to offer \$30 million to the
8 PTL Lender Group not to do the transaction with Serta Simmons?

9 A (No audible response.)

10 Q Are you telling this Court that was good faith, that was
11 fair, and that was ethical?

12 A It was, yes.

13 THE COURT: And perhaps I didn't hear him.

14 Mr. Kwon, was this offer actually made?

15 THE WITNESS: I believe it was communicated.

16 THE COURT: Okay. I just didn't hear that, my
17 apologies.

18 BY MR. RUZINSKY:

19 Q Mr. Kwon, after the 2020 transaction was consummated,
20 Apollo entered into a binding cooperation agreement with the
21 Angelo Gordon, Gamut, and other defendants in this case such as
22 Z Capital and Ascribe (phonetic). Is that correct?

23 A Correct.

24 MR. RUZINSKY: And would you please pull up
25 Exhibit 266?

1 And just because I don't want to forget anything,
2 Judge, did I move to admit 212?

3 THE COURT: You did.

4 MR. RUZINSKY: Thank you.

5 THE COURT: More importantly, did I admit it.

6 MR. RUZINSKY: Yes, that is more important.

7 THE COURT: I'm sorry.

8 (Laughter.)

9 THE COURT: I'm just giving you a hard time.

10 BY MR. RUZINSKY:

11 Q So we have 266, which is Tab 16, sir, in your binder.

12 A Thank you.

13 (Pause in the proceedings.)

14 BY MR. RUZINSKY:

15 Q Mr. Kwon, have you seen this before?

16 A No.

17 (Pause in the proceedings.)

18 MR. RUZINSKY: Your Honor, I'm going to move for the
19 admission of this document. My understanding is it's been
20 stipulated to be admitted.

21 THE COURT: Okay. Mr. Ehrlich, do you need to verify
22 that?

23 MR. EHRLICH: I will accept Counsel at his word, but
24 I'll reserve my rights as to this document, it's an Angelo
25 Gordon internal document. But the witness has already

1 testified --

2 THE COURT: Of course he said he'd never seen it
3 before.

4 MR. EHRLICH: -- he never saw. But no objection to
5 it being in the evidentiary record.

6 THE COURT: Then I'll admit, pursuant to the
7 agreement of the parties, 266 found at 866-3.

8 (Exhibit 266, ECF 866-3, received in evidence.)

9 MR. RUZINSKY: Thank you, Judge, and thank you,
10 Counsel.

11 BY MR. RUZINSKY:

12 Q Mr. Kwon, would you turn, please, to -- it's Slide 26,
13 it's page 28 of 110.

14 A Yes.

15 Q And do you see there in the first bullet point, "On
16 September 28, 2020 the Ad Hoc Group, the Serta lenders which
17 includes AG, Apollo and Gamut, executed the co-op agreement
18 forming the co-op group."

19 Do you see that?

20 A I do.

21 Q And do you see in the last bullet point under Co-op Key
22 Provisions, it says, "Since the -- AHG executed the co-op
23 agreement, other non-exchanged 1-L TL holders joined, including
24 Ascribe Capital, Alcentra, LMR, and Z Capital."

25 Do you see that?

1 A (No audible response.)

2 Q Okay. And is that consistent with your understanding?

3 A Correct.

4 Q All right. And also consistent with your understanding
5 that the co-op agreement was entered into in September of 2020.

6 A Yes.

7 Q And under the co-op key provisions I want to focus your
8 attention on the 3rd and 4th bullet points there. Do you
9 understand from this co-op agreement that the members of this
10 agreement were agreeing in September of 2020 that unless they
11 all agreed, that they wouldn't agree to certain things, one of
12 which was the vote to accept the Plan of Reorganization that
13 has not been consented to by everybody in their group.

14 A Well, consented to by the requisite holders.

15 Q And what did you understand the requisite holders to be?

16 A The Ad Hoc Group members who were in Apollo and Gamut.

17 Q Okay.

18 THE COURT: Mr. Kwon, could you just look at that
19 again, make sure that that's your testimony.

20 THE WITNESS: Can you repeat the question, please?

21 THE COURT: Sure. The question was, who were the
22 requisite holders, and you said -- what I heard you say was
23 Apollo -- or AG, Apollo and Gamut, which are identified as the
24 initial holders. And then it says, "And further identified as
25 requisite directing holders," defined term requisite holders,

1 and then it's got an amendment to it. And I'm just -- I just
2 want to make sure that you're going -- you're either going by
3 memory or reading the document, I just want to make sure I
4 understand what you're telling me.

5 THE WITNESS: Sure. Can you give me a second
6 because --

7 THE COURT: Of course.

8 THE WITNESS: -- there's a lot of definitions here.
9 (Perusing document.)

10 So I guess to answer, without the actual agreement I
11 can't tell you specifically who the requisite holders are, but
12 to your question about this third bullet point, that the group
13 cannot move forward unless it is consented by the requisite
14 holders. I just don't know who fits in that definition right
15 now.

16 MR. RUZINSKY: Your Honor, I'm going to pass the
17 witness.

18 THE COURT: All right. Is there anyone else that
19 supports confirmation that has questions?

20 Mr. Winger?

21 MR. WINGER: Your Honor, if it would be okay, may I
22 be excused, my oldest daughter is graduating college tomorrow
23 and I've got to get her on a plane.

24 THE COURT: That is a wonderful event in your life.
25 Congratulations. Where is she graduating from?

1 MR. WINGER: Fox University.

2 THE COURT: Very, very cool. That's -- you should be
3 very proud.

4 MR. WINGER: I am. I am.

5 THE COURT: Is she going to follow in your footsteps?

6 MR. WINGER: No chance. She's a --

7 THE COURT: No chance.

8 (Laughter.)

9 MR. WINGER: -- she's a stand-up comic, so it's a
10 little bit different. Maybe similar, but a little bit
11 different.

12 UNIDENTIFIED SPEAKER: Oh, yeah.

13 (Laughter.)

14 THE COURT: That just opens the door, I mean --

15 MR. WINGER: We can have a sidebar on that later,
16 have a sidebar later.

17 THE COURT: Congratulations. Absolutely.

18 MR. WINGER: Thank you. Thank you. We'll see you
19 next week. Thank you so much.

20 THE COURT: All right. Any Redirect?

21 MR. EHRLICH: Very briefly, Your Honor.

22 THE COURT: Certainly. Let me get you back --

23 REDIRECT EXAMINATION

24 BY MR. EHRLICH:

25 Q Mr. Kwon, I'd like to direct your attention back to

1 Debtor's 212, which is Tab 15 in your binder, in the binder
2 that the Debtors had given you.

3 A Where --

4 Q Or the lenders I should say. The one with all the tabs.

5 A The smaller binder or the gigantic binder?

6 Q And not the gigantic one. The one with all the tabs.

7 A Sorry, I --

8 Q And it's Tab 15, Debtor's Exhibit 212.

9 A Yes.

10 Q And these are the talking points that were prepared over
11 the weekend of June 6 and 7.

12 A Yes.

13 Q Now, Mr. Kwon, let me ask you a question. With respect to
14 the lenders that were in the PTL Group, do you have an
15 understanding of their cost basis in the Serta loans that they
16 owned?

17 A My understanding was that it was high.

18 Q Were any of them essentially par buyers in the
19 syndication?

20 A Most likely, yes.

21 Q And with respect to the lenders in your group, Gamut,
22 Angelo Gordon and Apollo, do you have an understanding of their
23 cost basis?

24 A Yes, it was significantly lower.

25 Q And do you understand that if you worked together in a

1 group that, as it says in this document, treats all parties the
2 same, the parties were they're proceeding from different cost
3 bases?

4 A Sorry, can you repeat that?

5 Q Were they proceeding from different cost bases if you
6 worked together --

7 A Yes.

8 Q -- the two groups? And so how does a fee or a purchase
9 at 65 cents of either a transaction fee or a purchase at
10 65 cents make sense in the context of the different cost bases
11 of the two groups of lenders?

12 A It's -- you could view it as compensating them for the
13 high cost basis that they have.

14 Q So that was -- so in other words, if you were to pit --
15 well, step back.

16 If you were to do that deal together that treated all
17 parties the same that's outlined here, would that have a
18 disproportionate negative effect on the PTL Lenders given their
19 cost basis?

20 A Right.

21 Q And was this an attempt to compensate them for that?

22 A I believe so.

23 Q Thank you. Nothing further.

24 THE COURT: All right. Thank you.

25 Anyone else?

1 (No audible response.)

2 THE COURT: Any Recross on that one issue?

3 MR. RUZINSKY: No, Your Honor.

4 THE COURT: All right. Any reason that Mr. Kwon
5 cannot be excuse?

6 MR. RUZINSKY: No, sir.

7 THE COURT: Mr. Kwon, number one, I am envious of
8 your educational background. I always love when I get to go up
9 to Wharton and teach from time-to-time. I can't imagine that
10 experience. It's a fabulous institution. So you should be
11 proud of that.

12 I very much appreciate your time this afternoon. You
13 are excused from the Rule, you are free to go. You are also
14 free to stay in the courtroom if you wish.

15 THE WITNESS: Thank you, Judge.

16 THE COURT: Thank you.

17 (Witness steps down.)

18 THE COURT: Mr. Ehrlich, would you -- how would --
19 and I'm totally open, would you like to take a lunch break,
20 would you like to go ahead with your last witness, what would
21 you like to do?

22 MR. EHRLICH: Can I confer briefly with Mr. Wilson?

23 THE COURT: Absolutely.

24 (Pause in the proceedings.)

25 MR. EHRLICH: Having conferred we would like to just

1 get it done.

2 (Laughter.)

3 THE COURT: Fair enough.

4 UNIDENTIFIED SPEAKER: There is that.

5 MR. EHRLICH: Okay. Can we take maybe a 15-minute
6 break?

7 THE COURT: Absolutely. So we'll adjourn until --
8 can we just say 12:30 just so I can keep it on an even number?

9 MR. EHRLICH: Perfect.

10 THE COURT: All right. Thank you.

11 MR. EHRLICH: Thank you, Your Honor.

12 THE COURT: Adjourned until 12:30.

13 THE CLERK: All rise.

14 (Proceedings adjourned at 12:35 p.m.)

15 * * * * *

16 *I certify that the foregoing is a correct transcript*
17 *to the best of my ability due to the condition of the*
18 *electronic sound recording of the ZOOM/video/telephonic*
19 *proceedings in the above-entitled matter.*

20 /S./ MARY D. HENRY

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25 DATE FILED: MAY 21, 2023